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In the Supreme Court of the United States

OCTOBER TERM, 1964.

No. 514

HENRY THOMAS BAILEY,
Petitioner,

v.

THE NEW YORK CENTRAL RAILROAD COMPANY,
Respondent.

PETITION FOR WRIT OF CERTIORARI

To the Court of Appeals, Cuyahoga County, Ohio,
Eighth Judicial District of Ohio.

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PETITION FOR WRIT OF CERTIORARI

To the Court of Appeals, Cuyahoga County, Ohio, Eighth Judicial District of Ohio.

OPINIONS BY COURTS BELOW.

The petitioner, Henry Thomas Bailey, respectfully prays that a writ of certiorari be issued to the Court of Appeals for Cuyahoga County, Ohio, Eighth Judicial District of Ohio, to review the judgment and decision of that Court in Case No. 26;738 entitled *Henry Thomas Bailey vs. The New York Central Railroad Company.* On April 15, 1964, the Court of Appeals affirmed a judgment of the Court of Common Pleas of Cuyahoga County in defendant's favor rendered by the Trial Court upon a motion by defendant at the conclusion of plaintiff's case, to direct a verdict on behalf of the New York Central Railroad. The judgment journal entry of the Court of Appeals dated April 15, 1964, is appended hereto as Appendix B. The memorandum to counsel written by Judge Charles White in the Trial Court, in which he granted defendant's mo-

tion for a directed verdict is attached to this Petition as Appendix A. The Court of Appeals rendered no opinion.

Petitioner thereupon sought a review of the cause by means of a motion to the Supreme Court of Ohio to direct the Court of Appeals to certify its record to the Supreme Court of Ohio for review, and also seeking a review of constitutional questions under the Constitution of the State of Ohio and of the United States, pertaining to the right of petitioner to a trial by jury in an action brought under the Federal Employers' Liability Act. The jurisdiction of the Supreme Court of Ohio to review the case is found under Article IV, Section 2, Constitution of the State of Ohio. Under these provisions of the Constitution of the State of Ohio, petitioner had no appeal as a matter of right to the Ohio Supreme Court. A review by that Court is discretionary upon the ground that the case is (1) "One of public or great general interest," or that a debatable constitutional question is involved. The review sought by petitioner raising questions of public or great general interest and constitutional questions was denied by the Ohio Supreme Court. The Supreme Court of Ohio refused to take jurisdiction of the cause and issued orders overruling petitioner's motion to certify, and determined that no debatable constitutional question was presented by the judgment of the Trial Court as affirmed by the Court of Appeals. Thus, all remedies available through the State Judicial System of the State of Ohio have been exhausted by petitioner.

Under the law of Ohio, therefore, the judgment of the Court of Appeals for Cuyahoga County, Ohio, Eighth Judicial District of Ohio, becomes the final judgment of the highest court of the State of Ohio in which a decision can be had. *Cuyahoga River Power Company vs. Northern Realty Company*, 244 U. S. 300, 37 S. Ct. 653.

JURISDICTION OF THIS COURT.

Jurisdiction of the Court to review the said judgment of the Court of Appeals for Cuyahoga County and to review the constitutional questions raised by petitioner are conferred upon this Court by the act of June 25, 1947, c. 646, 62 Stat., 929, Title 28 U. S. C. Sec. 1257. The portions of that section pertinent to jurisdiction of this review provide as follows:

> "Final judgments or decrees rendered by the highest court of the state in which a decision could be had, may be reviewed by the Supreme Court as follows:
>
> (3) By Writ of Certiorari * * * where any title, right, privilege or immunity is specially set up or claimed under the Constitution * * * or statutes * * * the United States."

QUESTIONS PRESENTED FOR REVIEW.

1. *Was the order directing a verdict for the defendant because of alleged lack of evidence that defendant had neither actual nor constructive notice of any defect on the premises an invasion of plaintiff's constitutional guarantee of trial by jury under the Federal Employers' Liability Act, 45 U. S. C. A. 51 and particularly the right of plaintiff to have the jury weigh the sufficiency of the evidence in the light of prior pronouncements by this Court?*

2. *Has the Trial Court and the Court of Appeals the jurisdictional power to remove the instant cause from the jury by weighing the evidence and finding it insufficient on the issue of notice?*

3. *Did the Court of Appeals, by affirming without opinion the Trial Court's ruling, correctly determine the requirement of proof of notice in accordance with the Federal Employers' Liability Act, 45 U. S. C. A. 51?*

4. Must an injured employee within the coverage of the Federal Employers' Liability Act adduce specific proof of actual or constructive notice when the proofs support a finding that the premises were defective and under the exclusive control of employees other than the injured employee for maintenance purposes?

5. Did the Trial Court and Court of Appeals misconstrue petitioner's right as to a cause of action under Section 51 of 45 U. S. C. by narrowly restricting the issue as to whether or not the respondent railroad had actual or constructive notice that the light bulb was burned out?

STATUTES INVOLVED.

The federal statutes involved in this review are those of the Federal Employers' Liability Act, particularly Section 1 thereof. (Title 45 U. S. C., Section 51.)

Jurisdiction of the federal claim by the State Court is provided in Section 6 of the F. E. L. A. (Title 45 U. S. C., Section 56.)

The foregoing federal statutes are appended to this Petition as Appendix C.

STATEMENT OF THE CASE.

Petitioner, plaintiff below, filed an action against the respondent railroad, defendant below, in the Court of Common Pleas of Cuyahoga County, Ohio. The petition, after the necessary allegations invoking the applicability to the Federal Employers' Liability Act, alleged negligence in the failure of the defendant to provide plaintiff a safe place to work, in failing to maintain the furnaces on the premises where plaintiff was working, and in failure to properly inspect and maintain the electric light bulb overhanging the steps that the plaintiff would have to descend in order to go to the cellar. Plaintiff further alleged that

by reason of such negligence and as a direct and proximate result thereof, he fell down the cellar steps when the light failed to go on, suffering severe injuries to his back; and an aggravation of a prior condition of cerebral arteriosclerosis and right hemiplegia secondary to cerebral thrombosis, which left him permanently impaired and disabled, and because of which he was unable to ever return to work.

As a result of all of these injuries, plaintiff prayed as damages the sum of Seventy-Five Thousand Dollars ($75,000.00).

Defendant, by its answer, admitted the employment of plaintiff and admitted that the plaintiff had fallen while on a stairway leading from the main floor of the dormitory where he was working to the boiler room area, when the overhanging light did not go on. Respondent thereupon employed in its answer to plaintiff's Petition an affirmative defense of sole negligence which was denied by a reply. The pleadings on which the issues were joined, specifically the Petition of petitioner, respondent's answer and the reply of petitioner, are all appended hereto, Appendix D, E, and F.

It is important to note that the only basis for the Trial Court's ruling in favor of respondent was that contained in the Trial Court's memorandum to counsel, appended hereto as Appendix A. The Trial Court said, in effect, that since respondent had no actual or constructive notice of the defective light, petitioner had failed to make out a jury case and accordingly, judgment was directed for defendant. "There is no evidence that defendant had either actual or constructive notice of any defect on the premises in question."

It is also significant to note that it was never disputed throughout the presentation of plaintiff's case that the

dormitory where plaintiff worked was at all times under the control and maintenance of the defendant, and similarly, that the plaintiff was employed by defendant as a janitor-porter in the dormitory where the accident occurred, performing work substantially in furtherance of interstate commerce within the coverage of the F. E. L. A.

The transcript of testimony which forms the basis of the record upon which a determination of the sufficiency of notice must be made will now be referred to in its important aspects in support of petitioner's claim that it was error to arrest his case from the jury. Numbers as they appear in parenthesis refer to page numbers in the typewritten transcript of testimony, i.e., the Bill of Exceptions as it was submitted to the Court of Appeals and to the Supreme Court of Ohio.

STATEMENT OF FACTS AND EVIDENCE.

This accident occurred on April 2, 1956, on the premises of the old Erie Depot operated and maintained by the respondent in Cleveland as a dormitory for incoming and outgoing dining car crews. On and prior to April 2, 1956, petitioner was an employee of the respondent, performing his duties generally as a janitor-porter.

Petitioner had been an employee of the respondent for some thirty (30) years in a variety of capacities. In 1950, he became the janitor-porter at the dormitory in Cleveland, having applied for the job following a slight cerebral stroke in 1948. The dormitory was under the control and maintenance of the respondent (R. 24, 25). Petitioner's duties generally were to check the crews in and out of the dormitory and to maintain a state of orderliness and cleanliness therein and to make beds (R. 310, 318). He had no duty with respect to lighting fixtures nor any work in that connection, including the changing of light bulbs

(R. 24, 34). The respondent employed electricians for all such electrical work which was under the supervision of the Superintendent of Buildings and Docks. It was the duty of the electrician employed by The New York Central Railroad Company to check electrical fixtures (R. 25, 34, 35, 218, 219, 325, 326). The dormitory and its electrical appurtenances and fixtures, including light bulbs, were customarily inspected once each week, and usually on a Monday, by the respondent's electrician (R. 34, 221, 291, 293). Petitioner's hours of duty were from 4:00 p. m. until midnight.

On the day in question, being a Monday, petitioner reported for duty at the usual hour. About 6:30 p. m., he received a complaint of excessive heat in the dormitory. He opened the doors and windows and turned the thermostat down. Other complaints followed, so that at about 8:30 p. m., he called the stationmaster's office and was informed that the office would try to do something about it, but that in the meantime, he should call The East Ohio Gas Company. This he did and the company promised to send a workman to the dormitory.

Petitioner's instructions were that if anything untoward should happen in the dormitory, he was to call Mr. Ryan, the superintendent of Dining Car Service and his immediate superior; if Mr. Ryan could not be reached, he was to call the stationmaster's office (R. 25, 26). At that hour of the evening petitioner did not have Mr. Ryan's residence telephone number.

When the time passed and the condition of overheating persisted, petitioner again called The East Ohio Gas Company; this was about 9:30 p. m. On that occasion, he was instructed to turn the thermostat down and to go to the basement and shut off the valve controlling the flow of gas. He was given instructions by the gas company

representative on how to locate the valve and how to operate the same. He proceeded to the door which was opened inward upon the stairway that led down to the basement; with his right hand he opened the door and with his left hand reached to his left and flicked the light switch, and he continued walking. The light did not come on. In the darkness, he fell as he completed his step (R. 30).

Mr. Bailey had been down that stairway on other occasions. About a month prior to the accident, he had occasion to go down there to look at a condition of flooding (R. 30 to 31). On every other occasion except the one on April 2, 1956, the lights came on when he flicked the switch (R. 31). He had never had occasion to use a flashlight (R. 31). The respondent furnished no flashlight for his use (R. 40, 41). No inspection of the premises had been made by respondent during his tour of duty that night.

Mr. Bailey never had occasion nor reason to check nor to change the light bulb over the stairway at any time during his duty at the dormitory (R. 34). Petitioner saw no loose light bulbs lying around the premises on the date of the accident (R. 35). The only bulbs that were available were in the electrician's toolbox which petitioner was not able to get into (R. 36).

As noted above, petitioner became permanently disabled as a result of this fall and remained unable to work from that time forth.

ARGUMENT.

Summary.

This Petition seeks to correct fundamental errors in the very nature and method of the judicial review indulged in by the Court of Appeals in an action under the Federal Employers' Liability Act, which fundamental errors the Supreme Court of Ohio refused to review, thereby reducing the judgment of the Court of Appeals to a final judgment.

Petitioner had sought review from the Court of Appeals of Cuyahoga County upon the Trial Court's judgment in favor of respondent on the express ground of an insufficiency of evidence of constructive or actual notice. In absence of an opinion by the Court of Appeals, the Trial Court's memorandum becomes the only basis for the Trial Court's action and it is the Trial Court's opinion, therefore, which petitioner asks this Court to review and to judge.

Questions 1 and 2.

One of the early fundamental cases in which the United States Supreme Court held that trial by jury is part and parcel of the remedy afforded railroad workers under the Federal Employers' Liability Act was *Bailey vs. Central Railway Co.*, 319 U. S. 350, 63 S. Ct. 1062 (1943). The *Bailey* case certainly did not prohibit appellate court supervision or jurisdiction over a jury verdict, but it did make it plain that action by Trial Courts or appellate courts in removing the case from the consideration of the jury by way of a directed verdict in "close or doubtful cases" did violence to the constitutional right under the Federal Employers' Liability Act of an injured railroad employee to trial by jury.

While perhaps the standard of a "close or doubtful case" as pronounced in the *Bailey* case might be considered somewhat nebulous in determining the test of a jury case under the Act, it would certainly seem that after the pronouncement in *Rogers vs. Missouri Pacific R.R. Co.*, 352 U. S. 500, 77 S. Ct. 443 (1957), a clear standard of what constitutes a jury case under the Act was prescribed. In the *Rogers* case, this Court made the now oft-quoted pronouncement:

> "Under this statute, the test of a jury case is simply whether the proofs justify with reason the conclusion that employer negligence played any part, *even the slightest*, in producing the injury or death for which damages are sought." (Emphasis added.)

For other cases emanating from this Court holding to the same principle, see *Lavender vs. Kurn*, 327 U. S. 645, 66 S. Ct. 740 (1946); *Tennant vs. Peoria & P.U.R. Co.*, 321 U. S. 29; *Schulz vs. Pennsylvania Railroad Co.*, 350 U. S. 523, 76 S. Ct. 608 (1956); *Gallick vs. The Baltimore & Ohio Railroad Co.*, 372 U. S. 108, 9 L. Ed. 2d 618 (1963); *Stone vs. N. Y. C. and St. L. R. Co.*, 344 U. S. 407, 73 S. Ct. 358, 97 L. Ed 441; *Carter vs. St. Andrews Bay R. Co.*, 338 U. S. 430, 70 S. Ct. 226, 94 L. Ed. 236; *Affolder vs. N. Y. C. & St. L. R. Co.*, 339 U. S. 96, 70 S. Ct. 509, 94 L. Ed. 683; *Coray vs. Sou. Pac. R. Co.*, 335 U. S. 520, 69 S. Ct. 275, 93 L. Ed. 208; *Dennis vs. Denver & R. G. W. R. Co.*, 84 S. Ct. 291; and *Meeks vs. Georgia Southern & Florida Railway Co.*, 108 Ga. App. 808; 134 S. E. 2d 555; (S. Ct. No. 981, decided 6/1/64 by this Court).

In the case of *Basham vs. Pennsylvania Railroad Co.*, 83 S. Ct. 965 (1963), where petitioner's version of the accident was disputed by respondent's expert testimony that the accident could not possibly have happened in that par-

ticular way, this Court held, as noted in headnote number 2:

> "If there is an evidentiary basis for a verdict in favor of a railroad employee in a suit under the Federal Employers' Liability Act for injuries sustained in the course of his employment, it is error for trial and appellate courts to re-evaluate conflicting evidence and mandate a result opposite of that reached by the jury."

The reading of these cases makes it abundantly clear, therefore, that if there was *any* evidence of even the "slightest" degree of employer negligence, i.e., failure to maintain a correctly functioning furnace and/or light fixture, a directed verdict does violence to the constitutional rights of plaintiff to a trial by jury in a case under the F. E. L. A., and such a directed verdict is contrary to the pronounced law of this Court in decisions similar to those quoted above.

The record in the instant case is replete with examples of negligence on the part of respondent, based primarily on the testimony of petitioner. In accordance with the *Basham* case, *supra*, petitioner's testimony alone should be sufficient to create a question to be resolved by a jury. The Trial Court itself recognized this when, before respondent's motion for directed verdict, the Court overruled respondent's motion to strike petitioner's third, fourth and sixth specifications of negligence finding "* * * that there is evidence from which the jury may draw permissible inference of an admission * * *." (R. 392.)

In analyzing the pertinent portions of the Trial Court's memorandum to counsel (Appendix A), this Court will note a concluding paragraph of Trial Judge White, in which the following was stated:

> "* * * if an inspection was made of the premises during the day on Monday, April 2, 1956, it is common knowledge that the light bulb could have burned out at anytime between the conclusion of the inspection and 10:30 p. m. that same day."

It is obvious that in this case, the Trial Court has presumptively made an assumption which a jury might or might not have made. The Trial Court, in other words, assumed without any evidence offered by respondent, that the light bulb could have burned out *even if* it was checked that day (*and there was no evidence by defendant regarding any inspection on that day*).

This is an assumption which a jury should have been given the opportunity to make or to discard, in accordance with cases cited above, and in light of what constitutes a jury case under the F. E. L. A. as noted by the Federal Courts. Under the most recent interpretations of cases arising under F. E. L. A., as for example, *Carney vs. Pittsburgh & Lake Erie Railroad Co.*, 316 F. 2d 277 (1963), and *Shenker vs. Baltimore & Ohio Railroad Co.*, U. S. 1 (1963) S. Ct. 1667 (1963), it was held that the railroad has a "nondelegable duty to provide its employees with a safe place to work, even when they are required to go onto premises of a third party over which the railroad has no control." (*Shenker vs. Baltimore & Ohio, supra.*)

There is no qualification here that the "non-delegable duty to provide its employees with a safe place to work" is in any way qualified by the proviso that notice, actual or constructive, must be shown, even where, as in the *Shenker* case, the employee was on the premises of a third party over which his employer had no control, and where the railroad had no actual or constructive notice of the defective mail car door of the P. & L. E. train.

In view of the fact that petitioner testified that the

duty of inspecting and maintaining the gas furnace and light fixture was strictly that of respondent, and that he, petitioner, had no responsibility to maintain or supervise the functioning of the gas furnace or light fixtures, and in light of petitioner's testimony that he was performing his stated duty as a janitor-porter in trying to correct the overheated condition, the jury had the very definite right to "select from among conflicting inferences and conclusions that which it considers most reasonable * * *." (*Tennant, Adm'x. vs. Peoria & P. U. Railway, supra.*) In other words, the jury in the instant case had a right to conclude that the respondent railroad had failed to make its usual inspection of the fixtures, or in making the inspection had done so inadequately, because had the inspection been carried out as it should have been carried out then the gas furnace would not have malfunctioned and the light bulb would have worked. Petitioner then would not have had to descend a darkened, hazardous stairway in order to correct a malfunctioning furnace. At least these inferences could have been selected by the jury had they been given the opportunity to make the selection.

Questions 3 and 4.

In the light of two very recent federal cases, the requirement of specifically showing notice in certain F. E. L. A. actions has been nullified. In the instant case, therefore, the Court of Appeals incorrectly determined the requirement of proof of notice in accordance with the cases to be cited below. These cases hold that where the instrumentality or instrumentalities causing the injuries were, at the time and prior thereto, under the control, maintenance and supervision of the respondent, or if the premises were defective and not reasonably safe and under the exclusive control of the railroad for maintenance purposes,

then notice can be inferred by the jury. We refer specifically to the cases of *Miller vs. Cincinnati, N. O. T. Pacific Railroad Co.*, 317 F. 2d 693 (6th Circuit of Ohio, 1963) and *Fassbinder vs. Pennsylvania R. R. Co.*, 322 F. 2d 859 (3rd Circuit of Pennsylvania, 1963). The *Fassbinder* case is especially significant because the 1963 decision overruled the original case in the District Court (*Fassbinder vs. Penna. R. R. Co.*, 193 F. Supp. 767) (1961), which the lower Court, in the instant case, heavily relied upon in justifying its ruling in favor of respondent.

In both the *Miller* and *Fassbinder* cases, the Court relied upon the doctrine of *res ipsa loquitur* and stated, in effect, that this doctrine justified a jury in inferring that respondent had either actual or constructive notice of a defect based upon the mere happening of the accident, where maintenance of the defective premises is under the control of employees of defendant other than petitioner.

The facts in the *Miller* case are worth examining so that the full significance of the Court's holding in its relationship to the present case can be more fully understood. In the *Miller* case, the plaintiff was returning a fire hose nozzle to its bracket and while doing so, he injured his right arm when the nozzle became disengaged from the bracket from an unknown cause. Without the trigger even being pressed, there was a high pressure discharge of water which caused the nozzle to become disengaged, whereby plaintiff was injured.

There was expert testimony that the nozzle was defective and the defendant agreed to the existence of the defect, but the defendant argued that there was no proof that the defect was known or should have been known by the defendant nor that they had any opportunity to correct the defect.

Thus, in its allegation of having no notice of the de-

fect nor of having the opportunity to correct the defect, the position of the defendant in that case was similar to the position of the respondent in this case, which also claims that it had no notice of the burned out light bulb and no opportunity to correct the light bulb if it had, in fact, burned out before the accident.

The issues presented in the *Miller* case were similar, therefore, to the issue in the case at bar, to-wit: Was there sufficient evidence from which a jury could find that the defendant had actual or constructive notice of the defective condition with the fire hose nozzle?

A second subsidiary issue was whether the doctrine of *res ipsa loquitur* applied?

In the *Miller* case, Judge O'Sullivan stated "the establishment of such an element (notice) * * * may come from proof of facts permitting a jury inference that the defect was discovered, or should have been discovered, by the exercise of reasonable care or inspection. 56 C. J. S. *Master and Servant*, Section 248, page 1002."

In other words, the Court was stating, in effect, that the fact the defect existed on that date of the accident was in itself sufficient to create a jury issue as to the question of notice as long as the instrumentality was under defendant's control.

In discussing the application of *res ipsa loquitur* to F. E. L. A. cases, the Court stated as follows:

> "An issue on notice was made solely on *res ipsa loquitur* which is applicable to actions under the F. E. L. A."

The Court then cited the following authorities, all of which hold to the same general principle that the notice issue was determined wholly by *res ipsa loquitur* which is applied to F. E. L. A. actions: *Southern Railway-Caro-*

lina Division Co. vs. Bennett, 233 U. S. 80, 34 S. Ct. 566; *Southern Railway Co. vs. Deer*, 240 F. 73 (CA 6, 1917); *Baltimore & Ohio R. R. Co. vs. Kast*, 299 F. 419 (CA 6, 1924), Cert. denied 266 U. S. 613, 45 S. Ct. 95, 69 L. Ed. 468; *Didinger vs. Pa. R. R. Co.*, 39 F. 2d 798 (CA 6, 1930); *Chesapeake & Ohio R. R. Co. vs. Smith*, 42 F. 2d 111 (CA 6, 1930), Cert. denied 282 U. S. 856, 51 S. Ct. 32; *Lowery vs. Hocking Valley R. R. Co.*, 60 F. 2d 78 (CA 6, 1932); *Carpenter vs. Baltimore & Ohio R. R. Co.*, 109 F. 2d 375 (CA 6, 1940); and *Nashville C. & St. L. Railroad Co. vs. York*, 127 F. 2d 606 (CA 6, 1942).

An extensive annotation on the applicability of the doctrine of *res ipsa loquitur* to actions arising under the Federal Employers' Liability Act is contained in 35 ALR 2d 478 et seq. On page 513 of this annotation is a long list of cases holding that the doctrine of *res ipsa loquitur* has been held applicable on the ground that the injury was caused by a defect in defendant's maintenance of the place of accident exclusively in its control. It is noted in this annotation that a dangerous condition of the premises will support the application of the doctrine (35 ALR 2d 521 et seq.). Thus, the doctrine applies to defective conditions of the premises as well as to defective appliances as long as the appliances or premises are under the exclusive possession, management and control of defendant, as they are in the instant case.

Included in this annotation are some of the cases cited by the 6th Circuit in the *Miller* case, which support the principle that defective premises give rise to the application of *res ipsa loquitur* as long as these premises are under the control and management of defendant. Specific reference is made to the cases of *B & O Railroad Co. vs. Flechtner*, 300 F. 318 (1924); and *Weigand vs. Pennsylvania Railroad Co.*, 267 F. 2d 281 (1959).

The 6th Circuit in the *Miller* case was very definite that in holding the doctrine of *res ipsa loquitur* applicable to F. E. L. A. cases, the element of notice could be inferred at the same time that *res ipsa loquitur* was applied. In the Court's words:

> "* * * as stated in *Sweeney vs. Erving*, 228 U. S. 233, 240 33 S. Ct. 416, 418, 57 L. Ed. 815, 819, * * * *res ipsa loquitur* means that the facts of the occurrence warrant the inference of *negligence* * * * (Emphasis added.)
>
> Application of the doctrine permits an inference of negligence, such inference must necessarily include all the essential elements of negligence including here an inference that defendant had actual or constructive knowledge of the defective condition of the nozzle."

In the same *Miller* case, the Court referred to the *Carpenter* case, *supra*, and stated that "the falling of the weight under the circumstances of this case in itself, was some substantial evidence of negligence on the part of the appellee." Reference was then made to *Restatement of the Law*, Agency 2d, Section 503, where in regard to the doctrine of *res ipsa loquitur*, the author says as follows:

> "The existence of a defect in a structure or instrumentality may of *itself* constitute evidence sufficient to warrant a finding that the master has *failed his duty of inspection.*" (Emphasis added.)

In the *Miller* case, *supra*, the Court also discussed the case of *Baltimore & Ohio Railroad Co. vs. O'Neil*, 211 F. 2d 190 (CA 6, 1954), reversed without opinion. In *O'Neil vs. Baltimore & Ohio Railroad Co.*, 348 U. S. 956, 75 S. Ct. 447, the new opinion supported the Court's holding in the *Miller* case, thereby indicating that the reversal was approved by Judge McAllister's original dissent in the *Baltimore & Ohio Railroad Company* case as reported in 211 F. 2d 190.

The facts in that case were as follows:

The plaintiff was injured by a breaking of a bolt. There was no direct evidence that the bolt was defective and the lower Court held that there was no evidence of notice *since the bolt was purchased new.* Judge McAllister's dissent included the following statement which has significance in the *Miller* case and, certainly, in the case at bar:

> "The rule of *res ipsa loquitur* creates an inference of fact. It casts on the opposite party the duty of going forward with evidence of risking that the jury will infer negligence from the occurrence * * *.
>
> * * * *it required a submission to the jury, since the mere fact that the bolt was new and unused was not such evidence that the inference of negligence could not stand against it* * *.*." (Emphasis added.)

Neither in the *O'Neil* case nor in the case at bar did defendant offer evidence of the previous condition of the defective light fixture or furnace, evidence of prior inspection of the premises or of the instrumentalities, nor evidence that they had been functioning prior to the date of the accident. In accordance with the *O'Neil* ruling as summarized in the *Miller* case, there can be no question but that defendant in this type of situation has the duty of going forward to offer evidence of the previous condition of the defective instrumentalities and of the premises where petitioner was working.

In the *Fassbinder* case, *supra,* plaintiff was injured in the course of his employment when he tried to close a railroad door which stuck because of a defective mechanism used to retain tension on the hand brake of the coach which is called a "dog." In its opinion, the Circuit Court held that the unusual accident was such as in the ordinary course of things would not have occurred if the defendant had used proper care. Therefore, the Circuit Court over-

ruled the District Court's holding that the case did not present a jury question and the upper Court held, in effect, that notice was an element that could be inferred by the jury and it was not necessary for the plaintiff to specifically prove actual or constructive notice in order to make out a jury question where defendant had control and supervision of the defective coach and "dog." Thus, the issue is squarely applicable to the issue in the instant case. As noted above, the *Fassbinder* case, in the lower Court, was heavily relied upon by the Trial Court, as well as by defense counsel, in supporting its motion for directed verdict. Since the *Fassbinder* case has been overruled, added weight has been lent to the theory propounded by petitioner herein, to-wit, *that where the instrumentality and the premises are under the control and supervision of the respondent, notice can be inferred by the jury and it need not be proven specifically by plaintiff.*

There can be no question but that this Court fully recognizes the applicability of *res ipsa loquitur* to cases arising under F. E. L. A. See, for example, *Jesenowski vs. Boston & Maine Railroad Co.*, 1947, 329 U. S. 452, 67 S. Ct. 401; *Sweeney vs. Erving, supra; Southern Railway Co. vs. Bennett, supra; O'Neil vs. B & O. R. R. Co., supra; Benner vs. Terminal R. Association*, 348 Mo. 928, 156 S. W. 2d 657, Cert. denied 315 U. S. 813, 62 S. Ct. 798; *Minneapolis & St. Louis R. R. Co. vs. Gotschall*, 244 U. S. 66, 37 S. Ct. 598 (1917). (Also see collected cases in 35 ALR 2d, pages 500 to 535.)

All the usual requirements necessary for the application of *res ipsa loquitur* are present in the instant case. First, the evidence is undisputed that the instrumentality causing the injury was "under the exclusive management and control of the respondent." Reference is made, for example, to the cross-examination of Sidney Morse, District Supervisor of Engineering and Electrical Maintenance for

respondent (R. 285-286), wherein he admitted that changing light bulbs on company property is normally claimed as electrician's work. (Petitioner as a janitor cannot, under union agreement, do the work of an electrician.)

There was also evidence by respondent that "routine maintenance procedure" was "to check this dormitory once a week, usually on a Monday if he was able to, and do such work as was found necessary in that check. *This was a standard practice that has been in effect for many years.*" (Emphasis added.) (R. 291.)

Petitioner, therefore, had the right to rely on the respondent electricians making their weekly maintenance checkups and to do whatever work was necessary, including the changing of light bulbs.

Not only was the instrumentality causing the injury under the exclusive management and control of the defendant as noted above, but the accident also occurred under such circumstances that in the ordinary course of events it would not occur if ordinary care were observed.

This was manifested by undisputed testimony that petitioner had been down the same steps on previous occasions, without mishap, and the light had always worked on those other occasions (R. 31). Since these lights were routinely checked and maintained by the respondent electricians, as noted above, there is a fair inference a jury could reasonably draw that on a night when this light did not go on the inspections had not been made or had been made in an inadequate manner.

It is important for this Court to note that on other occasions, when Mr. Bailey had gone down the steps to the basement, he always went down in the same manner that he went down on the day of the accident, to-wit: by continually walking through the door, switching on the light with one hand as he proceeded toward the steps (R. 37).

Thus, the jury could find on the basis of the direct examination of petitioner, that in the ordinary course of going down the cellar steps as he had done on other occasions, Mr. Bailey would not have fallen if the light would have gone on when he flipped the switch, as it had on other occasions.

Evidence is also abundant in the record that this accident was an unusual and extraordinary occurrence, and that the petitioner himself did not contribute to cause the defect in the lighting fixture or in the furnace and is not able to explain the cause of the breakdown in the fixture as well as respondent can.

He had never fallen before; the light had always gone on before, and the furnace had functioned without fault before; he performed his duties on this particular night as he had done on every other night in the past, and therefore, the failure of the light to go on and the malfunctioning of the furnace can truly be classified as unusual occurrences which brought about petitioner's accident.

The question of what is unusual or extraordinary depends upon the evidence adduced in each particular case. See *Herdman vs. Pennsylvania Railroad Co.*, 352 U. S. 518, 77 S. Ct. 4455 (1957).

Finally, in view of the evidence described above, that the maintenance and inspection of the light fixture was to be undertaken only by respondent, it must surely be admitted that respondent, through their agents, are more likely to be able to explain the reason for the failure of the light bulb and furnace to function than would be petitioner, whose job did not include the maintenance of the light fixture nor of the furnace, but only that of a "janitor-porter," to-wit: sweeping, keeping personnel comfortable, and registering people in and out of the dormitory (R. 310).

By no one's admission or standards did Bailey's pre-

scribed duties include the maintenance or inspection of lighting fixtures or the changing of light bulbs or the inspection or maintenance of the furnace in the cellar. If there was a question of a burned out fuse, or a burned out lightbulb, or defective wiring, or if there was some connection between the malfunctioning furnace and the defective lighting fixture, these would all be matters more likely to be explained by respondent who maintained these facilities than by petitioner who had absolutely no control or supervision over them.

The Federal Courts have also held, in applying the *res ipsa loquitur* doctrine, that the control over the defective instrumentality need not be solely in the hands of the one injured. As noted, for example, in the case of *Taylor vs. Reading*, 83 F. Supp. 804 (1949), "Exclusive physical control is not *sine qua non* for application of *res ipsa loquitur* in federal courts." Reference is also made, for example, to the *Jesenowski* case, *supra*, wherein the Court also stated that it was immaterial that "there was divided control of the offending instrumentality." See also *Allen vs. St. Louis-San Francisco R. R. Co.*, 297 S. W. 2d 483 (1956); *Marquadt vs. Kansis City Southern Railway Co.*, 358 S. W. 2d 49 (1962).

Of particular application to the instant case is headnote number 9, also in the *Marquadt* case:

> "Notice is not an ordinary requirement in a *res ipsa loquitur* instrumentality but that element is a matter of defense."

Thus, in the case at bar, it is up to respondent to prove whether they did or did not have notice and/or opportunity to correct, and whether inspection to examine or correct were or were not made.

In summary, therefore, to the argument on Question Nos. 3 and 4, we submit that the Court of Appeals and the Trial Court incorrectly determined the requirement of

proof of notice. The evidence was that the defective fixtures were under the direct control, maintenance and supervision of respondent, and since the accident was of a kind which would not have occurred if these instrumentalities had been properly maintained and inspected, and since the malfunctioning furnace and light were not brought about by any voluntary action on the part of petitioner, then the element of notice would not have to be specifically adduced by petitioner; it was a matter of defense for respondent, and a jury was warranted in finding the existence of actual or constructive notice on the part of respondent.

Question 5.

The Ohio Trial Court and Court of Appeals have misconstrued petitioner's rights as to a cause of action under Section 51 of 45 U. S. C., primarily by restricting the issue as to whether or not the respondent railroad had actual or constructive notice that the light bulb was burned out, so as to make the stairway unsafe to descend. *The correct issue is whether the proofs established that under the totality of existing facts and circumstances as a whole, there was evidence that the place of work was not reasonably safe.*

This Court has repeatedly held in actions under the Federal Employers' Liability Act that the jury has the right to search the evidence as a whole and give weight to factors and circumstances as a whole in determining whether the non-delegable continuing duty of providing a reasonably safe place to work has been complied with. See *Union Pacific Co. vs. Hadley*, 246 U. S. 330, 38 S. Ct. 318 (1918); *Bailey vs. Central Vermont Railway Co., supra; Blair vs. B & O Railway Co.*, 232 U. S. 600, 650 S. Ct. 545 (1945); *McBride vs. Toledo-Terminal Railroad Co.*, 354 U. S. 517, 77 S. Ct. 1398 (1957); *Dennis vs. Den-*

ver and Rio Grande Western Railroad Co., 13 Utah 2d 249, 372 P. 2d 3, 375 U. S. 208; *Gulf, Colorado & Santa Fe Railway Co. vs. Deen*, 353 U. S. 925, 77 S. Ct. 678 (1957), and 358 U. S. 57, 79 S. Ct. 1 (1958); *Rogers vs. Missouri Pacific Railroad Co., supra.*

In fact, this Court has gone so far as to hold that where the jury specifically rejects in a special verdict, all and singular of the specific claims of negligence advanced by the injured employee, but nevertheless finds generally that the railroad failed to exercise reasonable care to provide a safe place to work, that it was prejudicial error to enter judgment for the railroad, and that judgment for the plaintiff should have been entered. See *Panhandle & Santa Fe Railroad Co. vs. Arnold*, 353 U. S. 360, 77 S. Ct. 840 (1957).

CONCLUSION.

We feel that we have demonstrated from the controlling authorities that sufficient evidence warranting an inference of notice by the jury was adduced by petitioner in the presentation of his case. By affirming without opinion the ruling of the Trial Court in directing a verdict for respondent, the Court of Appeals did violence to the mandate of this Court that the function of weighing the evidence to determine whether it meets the standard of an inference of negligence and, therefore, of the concomitant requirement of notice is purely a function of the jury in this class of case. To remove the cause from the consideration of the jury by reason of a failure of petitioner to specifically prove actual or constructive notice on the part of respondent was in fact a usurpation of petitioner's right under the Federal Constitution as an employee in interstate commerce to a trial by jury. Determination as to the right to trial by jury has been construed by this

Court and required by it to have uniform application throughout the United States. Having examined the record, the duty of the Court of Appeals became that of reversing the judgment entered by the Trial Court since there was sufficient evidence presented from which a jury would have been warranted in finding the requisite element of actual or constructive notice by respondent.

RELIEF PRAYED FOR.

By reason of the foregoing, petitioner respectfully prays this Court that his Petition for Writ of Certiorari to the Court of Appeals for Cuyahoga County, Eighth Judicial District of Ohio, be granted by the Supreme Court of the United States; that judgment be thereupon entered by the Supreme Court of the United States as a reversal of the judgment of the Court of Appeals of Cuyahoga County; that this Court issue a mandate to the Court of Appeals for Cuyahoga County to accordingly reverse judgment for respondent and grant a new trial for petitioner.

Respectfully submitted,

M. I. NURENBERG and
M. L. HELLER,
Counsel for Petitioner.

APPENDIX A.

MEMORANDUM TO COUNSEL BY LOWER COURT.

(Filed 9/13/63.)

CHARLES W. WHITE, *J.*:

This is an action by favor of the Federal Employers' Liability Act.

At the close of plaintiff's case defendant moves for a directed verdict on the express ground that there is no evidence that defendant had either actual or constructive notice of any defect on the premises in question.

On April 2, 1956, and before, plaintiff was an employee of the defendant as a janitor-porter at a dormitory operated and maintained by the defendant in Cleveland for incoming and outgoing dining car crews. On that date defendant fell in the dark on a stairway in the dormitory while attempting to go to the basement room and cut off the flow of gas to an overheated furnace. He charged the defendant was negligent in:

1. Failing to provide a lighted stairway for his use;

2. Failing to warn of the absence of lighting on the stairway;

3. Failing to seasonably inspect, discover and repair the darkened condition of the stairway;

4. Failing to provide a properly functioning furnace;

5. Failing to exercise reasonable care to provide plaintiff with a safe place in which to work; and

6. Failing to seasonably inspect and maintain the gas furnace.

All of these specifications can, in the view of the Court, be summarized as a charge that defendant failed to

provide the plaintiff with a safe place in which to work.

The evidence adduced on behalf of the plaintiff, when given its most favorable intendment, tends to establish the following set of facts: Plaintiff had been an employee of the defendant for thirty (30) years in a variety of capacities. In 1950 he became the janitor-porter at the dormitory in Cleveland having applied for the job following a slight stroke in 1948. His duties generally were to check the crews in and out of the dormitory and to maintain a state of orderliness and cleanliness therein and to make beds. He had no duty with respect to lighting fixtures or work in that connection, including the changing of light bulbs. The defendant employed electricians for all such work under the supervision of the Superintendent of Buildings and Docks. The dormitory and its appurtenances were customarily inspected once each week and usually on a Monday. Plaintiff's hours of duty were from 4:00 P. M. to midnight.

On the day in question (being a Monday), plaintiff reported for duty at the usual hour. About 6:30 P. M. he received a complaint of excessive heat in the dormitory. He opened the doors and windows and turned the thermostat down. Other complaints followed so that at about 8:30 P. M. he called the Stationmaster's office and was informed that the office would try to do something about it but that in the meantime he should call the East Ohio Gas Company. This he did and the company promised to send a workman to the dormitory.

Plaintiff's instructions were that when anything untoward should happen in the dormitory he was to call Mr. Ryan, the Superintendent of Dining Car Service and his immediate superior; and that if Mr. Ryan could not be reached he was to call the Stationmaster's office. At that hour of the evening plaintiff did not have Mr. Ryan's residence telephone.

When time passed and the condition of overheating persisted, plaintiff again called the Gas Company about 9:30 P. M. On that occasion he was instructed to turn the thermostat down and to go to the basement and shut off the valve controlling the flow of gas. He was given directions by the Gas Company representative how to locate the valve and how to operate the same. He proceeded to the door which opens inward upon the wooden stairway with open risers leading to the basement. With his right hand he opened the door and with his left hand reached to his left and flicked the light switch. The light did not come on. In the darkness he fell at the same moment.

Plaintiff had been down that stairway on other occasions. About a month prior to his accident he had occasion to go down there to look at a condition of flooding. On every other occasion except the one on April 2, 1956, the light came on when he flicked the switch. He had never had occasion to use a flashlight. The defendant furnished no flashlight for his use. No inspection of the premises had been made during his tour of duty that night.

In support of its motion defendant cites a number of Federal Employers' Liability Act decisions, most of them being by United States Courts of Appeals.

In the case of *Fassbinder v. Pennsylvania Railroad Co.*, 193 F. Supp. 767 (1961), on motion by the railroad for a new trial, the District Court held that in the absence of proof of actual or constructive notice to the railroad of the defect in a coach, the employee, allegedly injured as a result of the defect, failed to establish his case under the Federal Employers' Liability Act. The Court pointed out that the action under the Federal Employers' Liability Act is one grounded upon negligence, that the basis of liability thereunder is, and still remains, negligence, and that subject to the qualifications which Congress has im-

ported into this Act, the term "negligence" as it appears in the Act "is founded on common law concepts of negligence and injury."

The Court added:

> "The common law concept of negligence and injury with respect to the duty of an employer to provide a safe place to work requires an employer to have actual or constructive notice of a defective condition before he can be charged with a violation of his duty," citing *Sano v. Pennsylvania R. R. Co.*, 282 F. 2d 936; (3 Cir., 1960); and *Dobson v. Grand Trunk Western R. R. Co.*, 238 F. 2d 545 (7 Cir., 1957).

The Court concluded that there being no proof of either actual or constructive notice plaintiff had failed to establish his case and a new trial was ordered.

Another of the cases cited by defendant in support of its motion is *Kaminski v. Chicago River & Indiana R. Co.*, 200 F. Rep. 2d 1 (7 Cir., 1952). In that case a conductor carrying a light fell through a hole in a customer's empty coal pit while walking along the track checking car numbers. The railroad had no actual or constructive knowledge of the condition which obtained upon its customer's premises. *Held*: Error for refusal to direct a verdict for defendant at the close of plaintiff's case.

The Court said, among other things:

> "The mere fact * * * that plaintiff sustained an injury does not render defendant liable. * * * Since the test of liability in this case is negligence, the burden of proving defendant's negligence was on the plaintiff. In other words, he must establish that some negligence of the defendant caused, in whole or in part, the injury of which he complains.
>
> "Here the evidence is that plaintiff himself had walked safely on this identical path or lane on many previous nights. He had looked at the lane and the

path he was traveling on the night in question and had noticed nothing unusual or unsafe. On that night he carried a light. He was watching where he was going and he could see where he was going. He testified that he saw nothing unusual or unsafe. He suddenly fell through the hole which he had never seen before. There was no evidence whatsoever in the record as to how long the hole had been in existence there. It could not have been in existence very long because plaintiff himself had walked safely and without observing any hole or any unsafe condition over the same path on previous nights. There is nothing in the record to indicate that the condition which caused plaintiff's fall had existed for more than a short time before the accident.

"Before defendant can be charged with negligence in failing to remedy the condition which caused plaintiff's injury, or failed to warn plaintiff of the existence of such a condition, it is necessary to establish that the defendant had actual knowledge of the condition, or, in the exercise of ordinary care, should have known of its existence. The record in this case clearly establishes that such circumstances did not exist here. The only inference that can reasonably be drawn from this record is that the condition which caused the accident had been created within a short time before plaintiff's injury. It may have been a matter of minutes or of hours, hence defendant cannot on this record be charged with constructive knowledge of the condition."

In *Atlantic Coast Line Railroad v. Collins*, 235 F. 2d 805 (4 Cir., 1956) (Cert. denied), wherein plaintiff injured his back while throwing a switch in the railroad yards the trial court refused a directed verdict for the defendant and it was held to be error. The sole question was whether there was sufficient evidence of negligence on the part of the railroad company to take the case from the jury. Plaintiff was a young man who had been in the

service of the company for several years, most of which time was spent as a switchman in the same yard. He reported for duty at 4:00 P. M. and the accident occurred at 7:00 P. M. The switching device was of a standard type, the operation of which was familiar to the plaintiff who had previously operated the same switch a dozen times before 4 and 7 o'clock without difficulty. Plaintiff's whole case was based upon his testimony that on the occasion of the injury "the switch was hard to operate."

The Court said, among other things:

"(The) testimony taken in the light most favorable to the plaintiff may give rise to the speculation whether the injury was due to a defective switch of the railroad company or to the defective back of the man; but speculation is not enough. 'The essential requirement is that mere speculation be not allowed to do duty for probative facts, after making due allowance for all reasonably possible inference favoring the party whose case is attacked.' " citing *Tennant v. Peoria & P. U. Ry. Co.*, 321 U. S. 29.

In *Schilling v. Delaware & H. R. Corporation*, 114 F. 2d 69 (2 Cir., 1940), paragraph 3 of the headnotes reads as follows:

"In order to render railroad liable for injury to brakeman who was run over when he caught his foot in space in tie which was composed of discarded rails welded together, the brakeman was required to prove either actual notice to railroad of defective condition of tie resulting from fact that cinder filling in tie had been washed out, or that the cinders had been washed out for sufficient length of time to charge railroad with constructive notice and duty to repair."

The Court said, among other things:

"As his day began at 4 o'clock that afternoon there was little on which the jury could have found that

the hole had been there long enough to charge the defendant with constructive notice and the duty to repair. Proof of actual notice was wholly lacking. One or the other must appear to make out actionable negligence for failure to repair."

A case of much interest is that of *Phillips v. Great Northern Railway Co.*, 100 N. W. 2d 765 (Minnesota Supreme Court 1960) on an issue whether the railroad failed to furnish a safe place to work because a light bulb had burned out. It was held to be reversible error to refuse a requested instruction as follows:

> "You are instructed that while defendant was under a continuing obligation to exercise ordinary care in providing plaintiff with a reasonably safe place to work, the mere fact that a light bulb was burned out at the time of the accident is not evidence of negligence on its part. Before you may find that defendant was at fault in this regard you must determine whether the evidence shows that defendant had a reasonable opportunity to replace the bulb and failed to do so."

The plaintiff in that case was a freight car repairman. He and other members of his crew went to lunch about 7:30 P.M. When they returned to work the foreman turned on the lights. The lights were located on poles about thirty feet from the ground. The bulb on the pole nearest the car where plaintiff was working was out. It was burning the night before. No one in the crew had authority to replace the burned-out bulb, nor was there any facility to reach it. That work could only be done by electricians. The foreman made a report that the light was out, the only thing he could do. The accident happened not more than fifty-five minutes after it was discovered that the light was out.

The Court said:

> "In our opinion, whether defendant had a reasonable opportunity to replace the burnt-out bulb was properly a matter for the consideration of the jury in its determination of whether defendant was negligent in failing to furnish a safe place to work because of lack of sufficient light. We think that the court erred in refusing to give the requested instruction, or to include in its charge the substance of it if the language used was subject to criticism."

The most recent case having some bearing upon the instant subject is that of *Miller v. Cincinnati, New Orleans & Texas Pacific Ry. Co.*, 317 F. 2d 693 (6 Cir., May 22, 1963) where the first headnote states as follows:

> "A railroad could not be held for negligence under the Federal Employers' Liability Act for a defective fire hose nozzle in absence of proof that the defect was known, or should have been known, by railroad with opportunity to correct it."

In the course of the opinion, it is said:

> "Defendant, however, properly argues that negligence cannot be predicated solely on the fact that the appliance was defective. (The action was not under the Safety Appliance Acts.) Under familiar law, defendant could not be convicted of negligence, absent of proof that such defect was known, or should or could have been known, by defendant, with opportunity to correct it."

The plaintiff here cites two cases as having an import contrary to that of the foregoing authorities. In *Beattie v. Elgin, Joliet and Eastern Ry. Co.*, 217 F. 2d 863 (7 Cir., 1955), a switchman complained of personal injuries sustained in a fall at his place of work. It was held that the question of whether presence of oil and grease at the place

of work created an unsafe place to work and caused plaintiff's fall and injuries and the question of defendant's knowledge, actual or constructive, of allegedly unsafe condition were for the jury. Under the circumstances of that case where there was some evidence that the unsafe condition had existed frequently and recurrently for some time and where the presence of grease and oil upon the sole and heel of a man's shoe was inevitable.

In *Chicago, Great Western Railway Co. v. Casura, et al.*, 234 F. 2d 441 (8 Cir., 1956), a switch foreman employed by the railroad was injured when a car moving on a spur track on a packer's premises came in contact with wooden gate while walking along the track. There was no evidence of notice but there was evidence that the condition causing the injury could have been discovered by timely inspection.

In passing, it may be noted that the Court has also examined the very recent case of *Gallick v. Baltimore & Ohio Railroad Co.*, 31 L. W. 4182 (2/19/63); 35 *Am. Jur.* 557, et seq.; 36 *Ohio Jur.* 2d 117, et seq.; and 2 *Cal. Jury Instructions* 1038 (No. 3034).

The foregoing authorities clearly point the way for the Court's decision in the instant case. Although it seems to have been assumed throughout the trial thus far that the electric light in question burned out, there is no evidence as to what the source of the defective condition actually was. While the ill-functioning gas furnace afforded the occasion for the plaintiff's attempt to go into the basement, it was not in and of itself a causal factor in the plaintiff's fall. If an inspection was made of the premises during the day on Monday, April 2, 1956, it is common knowledge that the light bulb could have burned out at any time between the conclusion of the inspection and 10:30 P.M. that same day.

The situation, therefore, is akin to that in the case of *Brady v. Southern Ry. Co.*; 320 U. S. 476, where the Court stated as follows:

> "The weight of the evidence under the Employers' Liability Act must be more than a scintilla before the case may be properly left to the discretion of the trier of fact—in this case, the jury. * * * When the evidence is such that without weighing the credibility of the witnesses there can be but one reasonable conclusion as to the verdict, the court should determine the proceeding by non-suit, directed verdict or otherwise in accordance with the applicable practice without submission to the jury, or by judgment notwithstanding the verdict. By such direction of the trial the result is saved from the mischance of speculation over legally unfounded claims."

Accordingly, the motion for a directed verdict in favor of the defendant must be granted.

Plaintiff excepts. O. S. J.

APPENDIX B.

JOURNAL ENTRY OF THE COURT OF APPEALS.

No. 26,738.

COURT OF APPEALS OF OHIO,
EIGHTH DISTRICT, COUNTY OF CUYAHOGA.

HENRY THOMAS BAILEY,
Plaintiff-Appellant,

vs.

THE NEW YORK CENTRAL RAILROAD CO.,
Defendant-Appellee.

JOURNAL ENTRY.

Date: April 15, 1964:

This cause came on to be heard on the appeal on question of law from the judgment of the Common Pleas Court of Cuyahoga County and was argued by counsel for the parties; and upon consideration, the Court finds no error prejudicial to the appellant, and therefore, the judgment of the Common Pleas Court is affirmed, and it is ordered that appellee recover of appellant his costs herein taxed.

The Court finds there was reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Common Pleas Court to carry this judgment into execution.

APPENDIX C.

STATUTES INVOLVED.

Title 45, U. S. C., Section 51.

Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories, and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this chapter, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter. Apr. 22, 1908, c. 149, § 1, 35 Stat. 65; Aug. 11, 1939, c. 685, § 1, 53 Stat. 1404.

APPENDIX D.

PETITION.

Now comes the plaintiff and for his cause of action says that at all times herein alleged and more specifically prior to and on April 2, 1956, defendant is and was a railroad corporation authorized to transact business under and by virtue of the laws of the State of Ohio; that as part of its business activities defendant operates a railroad common carrier of passengers and freight for hire, engaged in interstate and intrastate commerce; that pursuant to its operation as a common carrier at all times herein alleged defendant maintained for its train crews in the City of Cleveland, County of Cuyahoga and State of Ohio, a dormitory located at what was commonly known as the Old Erie Depot under the High Level Bridge in Cleveland, Ohio; that on April 2, 1956, and prior thereto, plaintiff was employed by defendant as a janitor-porter of said dormitory, which work substantially affected and was in furtherance of interstate commerce; that at all times herein alleged, and more specifically on April 2, 1956, both plaintiff and defendant were engaged in interstate commerce; that plaintiff's action is governed by and brought under an Act of Congress known as the Federal Employers' Liability Act, 45 U. S. C. A., Sections 51 through 59, and amendments thereto.

Plaintiff further says that on April 2, 1956, at approximately 10:30 P.M., he was on duty as a janitor-porter of defendant's dormitory as herein described; that at said time and place the gas furnace furnished by defendant to heat said dormitory was functioning improperly, thereby causing said dormitory to become overheated; that in connection with his occupational duties and in an attempt to correct said condition it was necessary for plaintiff to use a certain stairway leading from the main floor to the

boiler room provided, furnished and possessed by defendant within said dormitory; that the lighting of the stairwell of said stairway was not functioning at said time and place as the result of which plaintiff was caused to trip, stumble and fall, thereupon sustaining injuries to his person; that the maintenance of the lighting fixtures, lighting equipment and electrical wiring within the dormitory was at all times herein alleged under the possession, management and control of defendant and not the plaintiff.

Plaintiff further says that defendant was negligent in the following respects:

1. In failing to provide a lighted stairway for the use of plaintiff in the performance of his duties.

2. In failing to warn plaintiff of the absence of lighting on the stairway he was required to use to perform his duties.

3. In failing to seasonably inspect, discover and repair the darkened condition of said stairway which plaintiff was required to use.

4. In failing to provide a properly functioning gas furnace which necessitated the use of the dark stairway by plaintiff.

5. In failing to exercise reasonable care to provide plaintiff with a safe place in which to work.

6. In failing to seasonably inspect and maintain the gas furnace.

Plaintiff further says that by means of and in consequence of the foregoing negligent acts and omissions of the defendant, and as a direct and proximate result thereof, he was caused to trip, stumble and fall, thereupon sustaining injury to his person, consisting of a brain concussion and soft tissue injuries to his spine, knees and hips.

Plaintiff further says that said brain concussion was superimposed on a prior condition of cerebral arterio-

sclerosis and left hemiplegia secondary to cerebral thrombosis, causing same to become aggravated, activated and exacerbated.

Plaintiff further says that the soft tissue injuries to his cervical, dorsal and lumbar spine were superimposed upon pre-existing osteoarthritis, causing same to become aggravated, activated and exacerbated, and causing this plaintiff by reason of said injuries to suffer pain, disability, limitation in the use and function of his extremities and spine, and other disabilities to his person.

Plaintiff further says that he sustained a traumatic myofasciitis to the soft tissue structures adjacent to his spine.

Plaintiff further says that by reason of his injuries he has been forced to absent himself from his employment, thereby sustaining a loss of wages; that his ability to earn money has been permanently impaired.

Plaintiff further says that he now suffers and will suffer permanently from an inability to walk and get about.

Plaintiff further says that his injuries caused him to suffer nervous shock and great mental anguish, and he will suffer therefrom into the indefinite future.

By reason of which plaintiff has been injured and damaged in the sum of Seventy-Five Thousand Dollars ($75,000.00).

WHEREFORE, plaintiff prays judgment from the defendant herein in the sum of Seventy-Five Thousand Dollars ($75,000.00).

A. H. DUDNIK,

Attorney for Plaintiff.

APPENDIX E.

ANSWER.

First Defense.

Now comes the defendant, The New York Central Railroad Company, and for its answer to plaintiff's petition says that it is a railroad corporation organized under the laws of the State of Ohio and other states, doing business in Cuyahoga County, State of Ohio.

Defendant says that it maintains a dormitory in the City of Cleveland, Ohio, at what was commonly known as the Old Erie Depot under the High Level Bridge in Cleveland, Ohio.

Defendant says that on or about April 2, 1956, the plaintiff, Henry Thomas Bailey, was employed by it as a janitor-porter. Defendant says that on or about the third day of April, 1956, at 10:15 P. M., the plaintiff was found to have fallen while on a stairway leading from the main floor of the dormitory to the boiler room area.

Further answering, defendant denies each and every allegation or parts thereof in plaintiff's petition contained not hereinbefore specifically admitted to be true.

Second Defense.

For its second defense to plaintiff's petition, defendant incorporates and makes a part hereof the allegations, averments and denials of its first defense as though fully rewritten herein.

Defendant says that the injuries plaintiff complains of in his petition were solely and proximately caused by the negligence of the plaintiff himself.

Further answering, this defendant denies each and every other allegation or parts thereof contained not hereinbefore specifically admitted to be true.

WHEREFORE, having fully answered, defendant prays that it may go hence without day and recover its costs.

JOHN F. DOLAN,
JOSEPH T. RYAN,
Attorneys for the Defendant.

APPENDIX F.

REPLY.

Now comes the plaintiff and for his Reply to the first and second defenses contained in the Answer of defendant plaintiff denies each and every fact, statement and allegation contained therein save and except such as are an admission of a fact, statement or allegation contained in plaintiff's Petition.

Specifically, plaintiff denies that he was solely negligent as alleged in the second defense of the defendant and denies that he was in any manner negligent in the premises.

WHEREFORE, plaintiff having fully replied prays for judgment as in his Petition he has prayed.

A. H. DUDNIK,
Attorney for Plaintiff.

Interrogatories Attached to Reply.

Now comes the plaintiff and propounds the following Interrogatories and requests that they be answered under oath by the defendant.

1. State whether at the time and place alleged defendant's dormitory at the Old Erie Depot was used by dining car personnel of defendant.

2. If the answer to Number 1 is "yes," state whether said personnel included cooks, waiters, stewards and chefs.

3. If the answer to Number 1 is "yes," state whether said personnel served on trains coming from states other than Ohio.

4. If the answer to Number 1 is "yes," state whether said personnel served on trains destined for states other than Ohio.

5. If the answer to Number 1 is "yes," state whether said personnel were compensated for their services by defendant and carried on the payroll records of defendant.

6. State whether defendant has a record as to the train numbers of the personnel sleeping at said dormitory on April 2, 1956 and April 3, 1956.

7. If the answer to Number 6 is "yes," state the name, address and employment classification of all such personnel sleeping at said dormitory on April 2, 1956 and April 3, 1956.

8. If the answer to Number 6 is "yes," state the train numbers on which said personnel were serving.

9. State whether the dining car personnel referred to in Number 1 were required as part of their employment duties to stay at said dormitory, for the convenience of this defendant.

10. State whether the beds were numbered at the dormitory commonly known as the Old Erie Depot as of April 2, 1956 and April 3, 1956.

11. State whether defendant maintains sign-in slips or other records identifying all personnel sleeping at the dormitory known as the Old Erie Depot, and the bed numbers being used as of April 2, 1956 and April 3, 1956.

12. If the answer to Number 11 is "yes," state the

name and address of the person ordinarily in possession and control of said record.

A. H. DUDNIK,
Attorney for Plaintiff.

APPENDIX G.

ANSWERS TO INTERROGATORIES.

The answers to the interrogatories propounded by the plaintiff are:

1. Yes.

2. Yes.

3. Yes.

4. Yes.

5. No. While performing work yes, but not while at dormitory.

6. Yes.

7. Defendant demurs to this Interrogatory as not being pertinent to any issue raised by the pleadings.

8. Defendant demurs to this Interrogatory as not being pertinent to any issue raised by the pleadings.

9. No.

10. Yes.

11. Yes.

12. The person now in control and in possession of said record is Mr. John F. Dolan, Assistant General Attorney, The New York Central Railroad Company, 1324 West Third Street, Cleveland 13, Ohio.

JOHN F. DOLAN,
JOSEPH T. RYAN,
Attorneys for the Defendant.

Office-Supreme Court, U.S.
FILED
NOV 7 1964
JOHN F. DAVIS, CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1964.

No. 514.

HENRY THOMAS BAILEY,
Petitioner,

vs.

THE NEW YORK CENTRAL RAILROAD COMPANY,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE COURT OF APPEALS, CUYAHOGA COUNTY, OHIO,
EIGHTH JUDICIAL DISTRICT OF OHIO.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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1. The liability of the employer under the safe place to work concept of the Federal Employers' Liability Act is not absolute but is grounded upon negligence, and before an employer can be charged with negligence in failing to provide an employee a safe place to work, it must have actual or constructive notice of the defective condition causing the injury which cannot be inferred from the mere happening of the incident, and in the absence of such necessary probative facts, the court must determine the proceeding by directed verdict without submission to the jury. NO evidence of actual or constructive notice to the railroad of the burned out light bulb was presented 8

2. Where there is no evidence that the failure of the light bulb to light (cause of accident) was unusual or extraordinary or that the accident was such as is ordinarily the result of negligence which may be attributed only to the lack of care of the railroad, but the testimony shows that the occurrence of such failure was in fact commonplace, no jury question as to the negligence of the railroad is presented under the doctrine of res ipsa loquitur, as the facts of the occurrence do not warrant the inference of negligence.

   Additionally, the doctrine of res ipsa loquitur is not applicable when the plaintiff's own negligent conduct was a causative factor in bringing about his injury 22

3. When the evidence in an action against a railroad company under the Federal Employers' Liability Act is such that without weighing the credibility of witnesses there can be but one reasonable conclusion as to the verdict, the court should determine the proceeding by directed verdict or otherwise in accordance with the applicable state practice without submission to the jury.

Counsel for Petitioner admitted in both oral argument and in his brief in the Supreme Court of Ohio that "the technical requirements of res ipsa loquitur may not be presented" ... 28

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In the Supreme Court of the United States

OCTOBER TERM, 1964.

No. 514.

HENRY THOMAS BAILEY,
Petitioner,

vs.

THE NEW YORK CENTRAL RAILROAD COMPANY,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE COURT OF APPEALS, CUYAHOGA COUNTY, OHIO,
EIGHTH JUDICIAL DISTRICT OF OHIO.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

To the Honorable Chief Justice and
the Associate Justices of the
Supreme Court of the United States:

Respondent prays that this Court deny the Petition for Writ of Certiorari filed in this cause to review the judgment of the Court of Appeals of the Eighth Judicial District of Ohio, which judgment affirmed the judgment of the Court of Common Pleas of Cuyahoga County, Ohio, for the reason that the judgment is in accord with the applicable decisions of this Court which has heretofore decided the questions presented herein. The Supreme Court of Ohio overruled the Petitioner's Motion to certify the record in this cause and sustained Respondent's Motion to dismiss the appeal as of right for the reason that no substantial constitutional question was involved.

OPINIONS BY COURTS BELOW.

The petitioner herein is appealing from the decision of the Court of Appeals for Cuyahoga County, Ohio, Eighth Judicial District of Ohio, which unanimously affirmed the judgment of the Common Pleas Court of Cuyahoga County, Ohio, wherein respondent's motion for a directed verdict was granted at the close of plaintiff's case, as petitioner failed to prove any negligence on the part of the respondent herein in a case brought under the Federal Employers' Liability Act. For the convenience of this Court the Memorandum to Counsel of the trial court by Judge Charles W. White is set forth at the close of this brief as Appendix "A." The Journal Entry of the Court of Appeals of Ohio, Eighth District, approved by counsel for both parties, is appended hereto as Appendix "B." The opinion of the Supreme Court of Ohio reported at 176 Ohio St. 475, dismissing plaintiff's appeal as of right on constitutional grounds pursuant to respondent's motion to dismiss is appended hereto as Appendix "C." (Merit Docket Decision.). The Supreme Court of Ohio also overruled petitioner's motion to certify the record on the ground of public or great general interest.

QUESTIONS PRESENTED FOR REVIEW.

1. Shall this Court hold that the Court of Appeals erred in affirming the judgment of the trial court which granted defendant's motion for a directed verdict at the close of plaintiff's case on the ground that there was *no* evidence of negligence, i.e., *no* evidence of actual or constructive notice to the railroad of the defective condition which resulted in plaintiff's injury, so that plaintiff failed to establish his case under the Federal Employers' Liability Act?

2. Shall this Court hold that the Court of Appeals erred in affirming the judgment of the trial court which refused to submit the case to the jury on the doctrine of res ipsa loquitur, as it found that the doctrine was not applicable, as there was *no* evidence that the failure of the light bulb to light, the cause of the accident, was an unusual or extraordinary occurrence, and there were *no* proofs to indicate that said failure of the light bulb to light was such as in the ordinary course of things would not have happened if the respondent had used proper care?

(a) Additionally, shall this Court hold that the Court of Appeals erred in affirming the judgment of the trial court, which found that the doctrine of res ipsa loquitur was not applicable, when the evidence established that the plaintiff's own negligent conduct was a causative factor in bringing about his injury?

3. Shall this Court hold that the Supreme Court of Ohio erred in dismissing petitioner's appeal therein as of right for the reason that no substantial constitutional question is involved, where the trial court determined the proceedings by directed verdict in an action against a railroad company under the Federal Employers' Liability Act, where the evidence is such that without weighing the credibility of witnesses there can be but one reasonable conclusion as to the verdict?

STATEMENT OF THE CASE.

The petitioner, a janitor-porter of the respondent at its dormitory for dining car personnel, commonly known as The Old Erie Depot in Cleveland, Ohio, brought suit as the result of an accident caused by his misstep while attempting to descend a dark stairway leading from the main floor to the boiler room area of said dormitory. (R. 87.)

The significant evidence pertinent to the issues herein, given petitioner its most favorable intendment, is as follows: Petitioner testified that there was nothing defective with the landing or the stairway involved (R. 87), but that he fell because he was unable to see the first step after he stepped into the dark. (R. 81.)

On direct examination the petitioner testified that he never stopped walking (R. 30), and that he was walking a little faster than usual immediately before the accident, when he opened the door and stepped into the pitch dark beyond leading down the stairway. (R. 32.)

He further testified that he had already made his step to proceed down the stairway when he flicked the light switch (R. 33), and that the light had always gone on previously when anyone flicked the switch. (R. 38.)

(On cross-examination the petitioner admitted that he had been in a hurry to go down those stairs and that he was moving a lot faster than he usually did.) (R. 38.)

The petitioner's testimony also established that the first floor extended beyond the doorway making a platform or landing about 18 inches wide, which petitioner testified gave him sufficient room to stand there with safety completely inside the door and turn on the light switch. (R. 89.)

The petitioner's testimony established that the sole cause of the accident alleged in his petition was his in-

ability to see the first step after he stepped into the dark (R. 87, 81), resulting in his misstep and fall. There was no evidence that the light bulb was burned out or otherwise defective at any time before the accident, the only testimony with regard to the functioning of the light bulb being that it did light on previous occasions (R. 38), but it did not light at the precise moment of the accident. (R. 30.) The light bulb was working at 8:30 a. m. the morning following the accident. (R. 324.) There had never been any other occasion when the light did not go on. (R. 31.)

The only evidence in the record with regard to the prior inspection of the light bulb, which allegedly did not light at the instant of the accident, was that there was a standard practice to have the company electricians check the dormitory once a week on Monday as a matter of routine maintenance (R. 290, 291), which included the functioning of all light bulbs. (R. 293.) No record or report of such maintenance was made. (R. 293.)

The testimony of Sidney Morse, the respondent's District Supervisor of Engineering and Electrical Maintenance, was that he could not recall any specific complaints (R. 292), and that while changing light bulbs was considered electrician's work, other employees were permitted to change them when their own discretion indicated the necessity thereof. (R. 286, 287.) He further testified that employees were encouraged to change light bulbs that were out when conditions made it necessary (R. 289, 339), and that the practice was to immediately send a man over to take care of any complaints that were made. (R. 292.)

The petitioner testified that he was required to report a burned out light bulb if he found one (R. 219), and that he had on previous occasions reported burned out light bulbs. (R. 220.)

Petitioner testified that at approximately 6:30 p. m. of

the evening of the accident, a dining car waiter complained of the dormitory being too warm. (R. 27, 68.) Being unable to correct the situation himself he called the station-master about 8:30 or 9:00 o'clock to find out who was taking care of the heating system. (R. 28, 69, 70.) Approximately 20 or 30 minutes later he called the gas company for assistance. (R. 28, 29, 70.) He called the gas company again for the second time about 20 or 30 minutes after his first call to them (R. 29, 70), all three calls being made within an hour. (R. 71.)

Immediately after his second call to the gas company he left his desk and started to go downstairs pursuant to the gas company's instructions at which point he fell down while attempting to descend the stairway in the dark.. (R. 30, 71.)

After the accident the petitioner returned to his desk (at about 10:30 p. m.) and continued working until the end of his tour of duty at 12 midnight. (R. 40.)

The petitioner testified that the effects of a stroke he had in 1948 with regard to his right leg never went away (R. 123), but that it left him with a limp (R. 130, 133) which was obvious to anyone observing him. (R. 334, 340.) The petitioner also admitted to problems of dizziness and high blood pressure, headaches and dizzy spells for a long period of time prior to the accident alleged (R. 108, 109, 117, 119), in addition to the limitation of the use of his right arm and leg. (R. 122.)

After petitioner rested his case, respondent made a motion to strike certain allegations from the petition which was granted in part and denied in part. (R. 391.) Subsequently respondent moved for a directed verdict which was extensively argued by counsel for both parties, particularly with regard to the absence of proof of actual or constructive notice to the railroad of the alleged defective

condition (light bulb) which allegedly caused the injuries claimed. (R. 394.)

After taking respondent's motion under consideration and study in addition to oral arguments on the motion, the trial court granted respondent's motion for directed verdict. (R. 397.) Thereafter petitioner's motion for new trial was filed, as were briefs in support and in opposition thereto, and was overruled. The trial court made its decision in accord with the applicable decisions of the Supreme Court of the United States and all of the applicable decisions of the United States Courts of Appeals which had determined the precise questions here involved. (Appendix A.) (Applicable decisions were found in most of the Federal Judicial Circuits.)

The Court of Appeals unanimously affirmed the judgment of the trial court without opinion. (Appendix B.) Petitioner's sole assignment of error in the Court of Appeals was that the trial court erred in granting respondent's motion for a directed verdict on the ground that respondent did not have actual or constructive notice of the defect which petitioner claimed was not justified by law nor by the evidence.

Petitioner filed an appeal from the judgment of the Court of Appeals as of right on constitutional grounds, as well as on the condition that a motion to certify the record be allowed by the Supreme Court of Ohio. The Supreme Court of Ohio overruled petitioner's motion to certify and dismissed his appeal as of right for the reason that no substantial constitutional question is involved. (Appendix C.)

GROUNDS FOR DENYING CERTIORARI.

1. The liability of the employer under the safe place to work concept of the Federal Employers' Liability Act is not absolute but is grounded upon negligence, and before an employer can be charged with negligence in failing to provide an employee a safe place to work, it must have actual or constructive notice of the defective condition causing the injury which cannot be inferred from the mere happening of the incident, and in the absence of such necessary probative facts, the court must determine the proceeding by directed verdict without submission to the jury. NO evidence of actual or constructive notice to the railroad of the burned out light bulb was presented.

It has been clearly and firmly established that in the absence of proof of actual or constructive notice to the railroad of a defective condition, an employee allegedly injured as the result of such defect fails to establish his case under the Federal Employers' Liability Act, as the basis of liability under the Federal Employers' Liability Act is, and still remains, negligence. *Wilkerson v. McCarthy*, 336 U. S. 53, 93 L. Ed. 497 (1948).

One of the leading cases setting forth the foregoing rule applicable in FELA cases is *Atlantic Coast Line R. R. Co. v. Collins*, 235 F. 2d 805 (Fourth Cir., 1956) (Cert. denied), 352 U. S. 942, 77 S. Ct. 265, 1 L. Ed. 2d 238, where the Court of Appeals held that the evidence was insufficient to present a question for the jury as to the negligence of defendant railroad. In that case where the injury was allegedly sustained as the result of a defective switch, the court noted that in the last analysis the plaintiff's case rested upon the contention that negligence on the part of the railroad must be inferred from the mere happening of the incident, which is exactly plaintiff's contention in the

instant case. The court rejected plaintiff's contention noting that speculation would not be allowed to do duty for the essential requirement of probative facts and stated that:

> "Actual or constructive notice that a sufficient piece of equipment has become defective or dangerous through use must be shown to establish negligence on the part of the employer before an injured employee can recover damages."

Significant to the arguments presented in the instant case is the note found at the bottom of page 808 which reads:

> "2. It should be noted that the present suit is based upon the provisions of 45 U. S. C. A. Sec. 51 making carriers by railroad liable for injuries to employees resulting from the negligence of the carrier and is not brought under the Saftey Appliance Section, 45 U. S. C. A. Section 11, where an injured employee may recover by proving injury from a defective appliance without proof of negligence on the part of the carrier. Myers v. Reading Co., 331 U. S. 477, 67 S. Ct. 1334, 91 L. Ed. 1615."

The landmark case with regard to the requirement of actual or constructive notice is *Kaminski v. Chicago River and Indiana R. Co.*, 200 F. 2d 1 (Seventh Cir., 1952), where the Circuit Court of Appeals held that the evidence established the railroad did not have either actual or constructive knowledge of the condition which caused the injury and, therefore, was entitled to a directed verdict.

In that case in which an employee-conductor fell through a hole along the edge of a track which was maintained by an industrial concern, the court noted that while the defendant had a duty to exercise reasonable care to furnish plaintiff with a reasonably safe place to work, "It

was not an insurer of plaintiff's safety. The mere fact, therefore that plaintiff sustained on injury does not render defendant liable. *Atlantic Coast Line Railroad Company v. Dixon* (Fifth Cir.), 189 F. 2d 252."

The court in noting as is directly applicable to the instant case that there was no evidence whatsoever in the record as to how long the hole had been in existence there, held:

> "Before defendant can be charged with negligence in failing to remedy the condition which caused plaintiff's injury, or failed to warn plaintiff of the existence of such a condition, it is necessary to establish that the defendant had actual knowledge of the condition, or, in the exercise of ordinary care, should have known of its existence."

The court found that the only reasonable inference that could be drawn from such record was that the condition had been created within a short time before plaintiff's injury, hence defendant could not be charged with constructive knowledge of the condition. Cf. *Sears v. Southern Pacific Co.*, 313 F. 2d 498 (Ninth Cir., 1963), in which the second numbered paragraph of the headnotes reads as follows:

> "'Railroad's knowledge, actual or constructive, of peril in assertedly hazardous condition was material fact essential to xistence of negligence. Federal Employers' Liability Act, §§ 1-10 as amended 45 U. S. C. A. §§ 51-60."

It is clear from the foregoing that in the instant case, where there was not one scintilla of evidence to establish either actual or constructive notice to the railroad of the alleged defective light bulb, that plaintiff has failed to prove any negligence on the part of defendant railroad.

In the case of *Miller v. Cincinnati, New Orleans and Texas Pacific Railway Co.*, 317 F. 2d 693 (Sixth Cir., May, 1963), in which the employee was injured by the defective condition of a nozzle which permitted a discharge of water without the trigger having been pressed, the court stated:

> "Defendant, however, properly argues that negligence cannot be predicated solely on the fact that the appliance was defective. *Under familiar law, defendant could not be convicted of negligence, absent proof that such defect was known, or should or could have been known, by defendant, with opportunity to correct it.* 56 C. J. S. Master and Servant Section 244, p. 1000. Carnegie Steel Co. v. Byers, 149 F. 667, 669 (C. A. 6, 1907); Atlantic Coast Line R. Co. v. Collins, 235 F. 2d 805, 809 (C. A. 4, 1956) cert. denied 352 U. S. 942, 77 S. Ct. 265, 1 L. Ed. 2d 238. *This rule is applicable to FELA actions where negligence is essential to recovery.* Kaminski v. Chicago River & Indiana R. Co., 200 F. 2d 1, 3, 4 (C. A. 7, 1952); Wilson v. Missouri Pacific R. Co., 319 Mo. 308, 5 S. W. 2d 19, cert. denied 278 U. S. 622, 49 S. Ct. 25, 73 L. Ed., 543." (Emphasis added.)

The court then went on to say it agreed with the district judge that the issue of notice had been made holding that they depended entirely on the doctrine of res ipsa loquitur in that case, relying on *Sweeney v. Erving*, 228 U. S. 233, 240, 57 L. Ed. 815, 819, which stated that:

> "* * * Res ipsa loquitur means that the facts of the occurrence warrant the inference of negligence * * *."

It can be seen that the *Miller* case which is relied upon so heavily by the plaintiff herein definitely supports and follows the rule that a railroad cannot be held for negligence under the Federal Employers' Liability Act for a defective condition in absence of proof that the defect

was known or should have been known by the railroad with opportunity to correct it.

The court found for the plaintiff on the *proofs* of that case which *warranted* the application of the doctrine of res ipsa loquitur contrary to the proofs of fact in the instant case which do not warrant the application of said doctrine, as will be discussed more fully hereinafter.

It is also significant to note the court's footnote at the bottom of page 695 of its opinion that that action was not an action under the Federal Safety Appliance Act, following the statement in its opinion that negligence cannot be predicated solely on the fact that the appliance was defective.

There can be no doubt that the defendant railroad herein is not an absolute insurer against personal injuries suffered by its employees, and that in an action under the Federal Employers' Liability Act, negligence is still the test of liability. *Wetherbee v. Elgin J. & E. Ry. Co.*, 191 F. 2d 302 (Seventh Cir., 1951). Although the United States Supreme Court has allowed juries a liberal latitude in deciding whether particular facts make out employer negligence, nevertheless, its opinions "clearly indicate that there must still be a judicial appraisal as to the sufficiency of evidence to support a jury verdict. See, e.g., *Inman v. Baltimore and Ohio R. Co.*, 361 U. S. 138, 80 S. Ct. 242, 4 L. Ed. 2d 198 (1959); *Herdman v. Pennsylvania R. Co.*, 352 U. S. 518, 77 S. C. 455, 1 L. Ed. 2d 508 (1957)." *Shea v. New York, West Haven and Hartford R. Co.*, 316 F. 2d 838 (First Cir., May, 1963), in which the Court of Appeals affirmed a directed verdict for defendant in a Federal Employers' Liability Act action holding that plaintiff failed to make a submissible case that defendant was negligent or that any actual omissions of defendant caused injuries.

Of particular interest herein is the case of *Phillips v.*

Great Northern Railway Co., 100 N. W. 2d 765 (S. Ct. of Minnesota, 1960), in which the court held that the trial court erred in refusing a requested instruction that a burned out light bulb was not evidence of negligence unless the railroad had a reasonable opportunity to replace it.

The requested instruction, which the court held refusal to give was reversible error, read as follows:

> "You are instructed that while defendant was under a continuing obligation to exercise ordinary care in providing plaintiff with a reasonably safe place to work, the mere fact that a light bulb was burned out at the time of the accident is not evidence of negligence on its part. Before you may find that defendant was at fault in this regard you must determine whether the evidence shows that defendant had a reasonable opportunity to replace the bulb and failed to do so."

The facts were that the railroad through its foreman had notice 55 minutes before the accident that the light was out, thereby properly making it a matter for the consideration of the jury as to whether the defendant had a reasonable opportunity to replace the burned out light bulb, and was negligent in not doing so, as opposed to the present case where the evidence is that no one had any notice or knowledge whatsoever as to the burned out light bulb until the accident occurred. In fact, there is no evidence whatsoever that the alleged defect even existed a moment before Mr. Bailey's accident herein. (R. 31, 38, 220.)

The third numbered paragraph of the headnotes in *Schilling v. Delaware & H. R. Corporation*, 114 F. 2d 69 (Second Cir., 1940), reads as follows:

> "In order to render railroad liable for injury to brakeman who was run over when he caught his foot in space in tie which was composed of discarded rails welded together, the brakeman was required to prove

> either actual notice to railroad of defective condition of tie resulting from fact that cinder filling in tie had washed out, or that the cinders had been washed out for sufficient length of time to charge railroad with constructive notice and duty to repair. Federal Employers' Liability Act, 45 U. S. C. A. Section 51 et seq."

The court noted that although meager, there was some evidence upon which the jury could have found that the hole had been there long enough to charge the defendant with constructive notice and the duty to repair, as differentiated from the instant case where there is no evidence that the light bulb had burned out even a moment before the accident. (R. 31, 38, 220.)

In *Sano v. Pennsylvania Railroad Co.*, 282 F. 2d 936 (Second Cir., 1960), the court in explaining the general rule that the liability of the employer under the safe place to work concept is not absolute but grounded on negligence stated:

> "However, before the employer can be charged with negligently failing to provide a safe place to work he must have actual or constructive knowledge of the defective condition. Schilling v. Delaware & H.R. Corp., supra; Kaminski v. Chicago River & Indiana R. Co., supra."

See also *Dobson v. Grand Trunk Western Railroad Co.*, 248 F. 2d 545 (Seventh Cir., 1957).

In *Beattie v. Elgin, Joliet and Eastern Railway Co.*, 217 F. 2d 863 (Seventh Cir., 1954), the court recognized the requirement of actual or constructive notice to the railroad of an allegedly unsafe condition of place to work where the injury was caused by such unsafe condition, but found that "the evidence would justify the jury in finding that this unsafe condition had *existed frequently and re-*

curringly for such a long time that defendant had constructive notice thereof," so that in the exercise of ordinary care, it ought to have known of the presence of the oil and grease. (Emphasis added.)

A most recent case to be found on the question of actual or constructive notice is *Vidal v. New York Central Railroad Co.*, 220 F. Supp. 922, affirmed by United States Court of Appeals, 2d Cir., on March 23, 1964, 329 F. 2d 628, wherein the United States District Court for the Southern District of New York held in rendering a judgment for the defendant railroad in an FELA action, that even if the employee had proven the equipment in question was defective, that in order for the employer to have been negligent, not only must there have been evidence of defective equipment but also evidence of actual or constructive knowledge of this condition by the employer. The court noted that the record was devoid of testimony on this score as is true in the instant case.

A cogent discussion of the law with regard to the liability of the employer under the Federal Employers' Liability Act is found in the opinion of Chief Judge Taylor of the United States District Court, Eastern District of Tennessee, Northern Division (1962), in *Rubley v. Louisville and Nashville Railroad Co.*, 208 F. Supp. 798, wherein the court granted defendant's motion for judgment notwithstanding a verdict for plaintiff. The court held that the Federal Employers' Liability Act does not define negligence, but that the question is to be determined by common law principles as applied in the federal courts, citing *Urie v. Thompson*, 337 U. S. 163, 93 L. Ed. 1282 (1949). The court further stated that the test of a jury case under the Act, as stated by the Supreme Court, is whether the evidence justifies with reason the conclusion that the em-

ployer's negligence played any part in producing the injury, citing *Rogers v. Missouri Pacific Railroad Co.*, 352 U. S. 500, 77 S. Ct. 443, 1 L. Ed. 2d 493 (1957).

The court then went on to point out that foreseeability is a necessary element of negligence, quoting with favor the following language used by the appellate court in *Hawkins v. Clinchfield R. Co.*, 266 S. W. 2d 840, which affirmed the trial court's dismissal of an action under the FELA where a brakeman stepped off an engine onto a nail which injured his foot:

> " 'The Federal Employers' Liability Act does not impose liability upon an employer to create a right in favor of an employee merely by reason of the fact an employee suffers an injury in the course of performance of the duties of his employment. The mere happening of an accident in the course of employment will not warrant a recovery; under this Act, as at common law, the basis of liability is negligence on the part of the employer railroad companies. 'Negligence,' it is said, must have been the cause of the employee's injury, and in the absence of negligence on the part of the employer, or of fellow employees for whose acts the employer is responsible, a recovery cannot be had. Conduct which is described by the term 'negligence' may not be inferred from the fact that the employee has been injured. Nor will effect be given under the Act to a state statute which purports to create a presumption of negligence. Negligence is a test not of the applicability of the act, but of the employer's duty or obligation to respond pecuniarily for the injury.' * * *"

Judge Taylor noted in that case, as is significant and applicable to the instant case, that:

> "There was *nothing to put defendant on notice* that the noise was affecting plaintiff's hearing or any of his fellow employees." (Emphasis added.)

In another case in which the trial judge granted the railroad's motion for a directed verdict and entered judgment for the defendant, *Swartz v. New York Central Railroad Co.*, 323 F. 2d 713 (Seventh Cir., October, 1963), the Court of Appeals in affirming the judgment of the trial court stated:

> "We are mindful that even though there is only slight evidence of negligence in a Federal Employers' Liability Act case, the case must be submitted to a jury. Some evidence, nonetheless, of failure to exercise reasonable care, direct or inferential, must be adduced; otherwise, speculation would be substituted for probative facts and reasonable inferences drawn from those facts.
>
> "The record here is devoid of any evidence of negligence on the part of the railroad. Consequently, the trial judge correctly granted the motion for a directed verdict. Milom v. New York Central Railroad Co., 248 F. 2d 52 (7th Cir. 1957), cert. denied 355 U. S. 953, 78 S. Ct. 537, 2 L. Ed. 2d 529 (1958)."

It cannot be disputed that when there is no rational evidentiary basis for a jury verdict, a case must not be submitted for jury determination. See *Dessi v. Pennsylvania Railroad Co.*, 251 F. 2d 149 (Third Cir., 1958) (Cert. denied, 356 U. S. 967, 78 S. Ct. 1006, 2 L. Ed. 2d 1073). In the above-cited case the Court of Appeals affirmed the judgment entered for the railroad notwithstanding a jury verdict for the employee of the railroad and held that the evidence was insufficient to justify submission to a jury in an action brought under the Federal Employers' Liability Act. The court noted that the recent decisions of the United States Supreme Court do not suggest that an FELA plaintiff can carry his burden of proof without evidence of negligence from which the causal relationship could be reasonably inferred, noting the repeated use of the phrase

"with reason" in the landmark case of *Rogers v. Missouri Pacific R. Co.*, 352 U. S. 500, 77 S. Ct. 443, 1 L. Ed. 2d 493 (1957).

The court rejected the argument that a jury verdict under the FELA could be permitted to stand, even though based solely on speculation.

It must be noted that in the present case there is no evidentiary basis whatsoever to show that the prior inspection that was made by the electricians or that any prior inspection whatsoever would disclose that the light bulb had burned out. There was no evidence that the light bulb would not light even a moment before the accident alleged by plaintiff herein. (R. 31, 38, 220.)

The plaintiff in arguing that actual or constructive notice is not an essential element upon which the finding of negligence may be made relies upon the cases of *Carney v. Pittsburgh and Lake Erie Railroad Co.*, 316 F. 2d 277 (1963) (Cert. denied, 375 U. S. 814, 11 L. Ed. 2d 49), and *Shenker v. The Baltimore and Ohio Railway Co.*, 83 Sup. Ct. 1667, 10 L. Ed. 2d 709 (1963). It must be pointed out, however, that the rationale of those two cases is that when a railroad employee's injury is caused by the fault of *others* performing under contract operational activities of his employer, such others are *agents* of the employer within the meaning of Section 1 of FELA. In those cases there was no issue as to fault or negligence but merely whether the negligence of someone acting in the furtherance of the railroad's enterprise should be considered as the negligence of the railroad, as such other party's activities make them an adjunct of the railroad. See *Carney v. Pittsburgh and Lake Erie Railroad Co.*, 316 F. 2d 277 (1963) (Cert. denied, 375 U. S. 814, 11 L. Ed. 2d 49).

In the *Shenker* case this Court specifically avoided the issue of notice on the basis that a railroad is bound to in-

spect foreign cars which have defects visible or discoverable by ordinary inspection and must either remedy such defects or refuse to take such cars. In the instant case there is no evidence whatsoever that the defect in question was discoverable by ordinary inspection or that there was, in fact, any defect whatsoever except at the instant of the accident.

The plaintiff herein attempts to assert that the jury is entitled to speculate as to whether defendant was negligent and further to speculate what that negligence was, having cited in the Court of Appeals as an authority therefor *Michalic v. Cleveland Tankers Inc.*, 364 U. S. 325, 81 S. Ct. 6, 5 L. Ed. 2d 20 (1960).

It must be noted, however, that Justice Brennan in the *Michalic* case distinguished between the doctrine of seaworthiness, wherein the vessel's duty to furnish seamen with tools reasonably fit for their intended use is absolute, and the duty of the owner under the Jones Act, comparable to the FELA, which is to exercise reasonable care. The court noted in contrast to the doctrine of seaworthiness, that under the negligence concept (as under the Jones Act or FELA), " 'there is only a duty to use due care, i.e., reasonable prudence, to select and keep in order reasonably suitable appliances. *Defects which would not have been known to a reasonably prudent person at the outset, or arose after use and which a reasonably prudent person ought not to have discovered would impose no liability.*' * * *." (Emphasis added.)

In the instant case there is not one shred of evidence that the alleged defective condition could have been discovered by reasonable inspection, or that it in fact even existed prior to Mr. Bailey's accident. The plaintiff insists that from the fact that the light bulb did not light at the exact moment of the accident it can be inferred that this

condition existed for some considerable time prior to the accident from which it can be inferred in the alternative that either the railroad electricians omitted to make a regular routine inspection, or that if they did so inspect said light bulb, that it was done carelessly. This is to say in effect that the defendant is the insurer of the safety of its employees, and that it had an absolute duty, as under the *Federal Safety Appliance Act*, as to the efficient operation of said light bulb, which is plainly not the law.

From the foregoing it is clear that it has been firmly established, notwithstanding plaintiff's protestations to the contrary, that proof of actual or constructive notice is a mandatory requirement to establish defendant's negligence in the present case. Plaintiff's failure to prove such notice required the trial court to arrest the case from the consideration of the jury. See *Brady v. Southern Railway Co.*, 320 U. S. 476, 88 L. Ed. 239, where this Court noted that a directed verdict in such cases would save the result "from the mischance of speculation over legally unfounded claims."

With regard to the existence of any condition of the premises herein which might have preceded the injury, the following statement of this Court in the *Brady* case should foreclose further argument:

> "Liability arises from negligence not from injury under this Act. And that negligence must be the cause of the injury."

It is to be noted that this Court in the *Brady* case, and even so recently as in the "bug bite" case, *Gallick v. The Baltimore and Ohio Railroad Co.*, 372 U. S. 108, 9 L. Ed. 2d 618 (1963), found that reasonable foreseeability of harm was an essential ingredient of Federal Employers' Liability Act negligence. In doing so in the latter case it

relied upon evidence of the existence of a stagnant, vermin-infested pool of water over a period of years of which defendant had actual knowledge, thereby holding defendant to be negligent in maintaining the filthy pool of water. The instant case presents the opposite situation in that the defendant could not foresee (and prevent) what it did not know or could or should not have known in the exercise of reasonable care.

As held by this Court in *Inman v. The Baltimore and Ohio R. Co.*, 361 U. S. 138, 80 S. Ct. 242, 4 L. Ed. 2d 198 (1959), the burden of proving that the place of accident was an unsafe place to work was on the plaintiff. That court further stated, as is pertinent to the instant case:

> "There is no evidence of complaint to the railroad, nor is there other testimony of similar occurrences in the record. In making the judicial appraisal of this tenuous proof, Ohio's Court of Appeals held it not sufficient. It found there was 'no evidence of prior occurrences of the kind here under consideration' in the record. Indeed, unless these 11 words of the witness can be said with reason to be sufficient, there is none. Under such circumstances, they are too slender a reed for us to say that the decision of Ohio's court is erroneous."

This Court in this action under the Federal Employers' Liability Act affirmed the judgment of the Court of Appeals of Ohio which found that there was a complete failure of proof to establish negligence on the part of the railroad (108 Ohio App. 124).

2. Where there is no evidence that the failure of the light bulb to light (cause of accident) was unusual or extraordinary or that the accident was such as is ordinarily the result of negligence which may be attributed only to the lack of care of the railroad, but the testimony shows that the occurrence of such failure was in fact commonplace, no jury question as to the negligence of the railroad is presented under the doctrine of res ipsa loquitur, as the facts of the occurrence do not warrant the inference of negligence.

Additionally, the doctrine of res ipsa loquitur is not applicable when the plaintiff's own negligent conduct was a causative factor in bringing about his injury.

The clear weight of authority being against him on the issue of the essential requirement of actual or constructive notice as is set forth hereinabove, and as was clearly and completely set forth in the lower court's memorandum (Appendix A attached hereto), the plaintiff makes a last ditch attempt to save the day by arguing the applicability of the doctrine of res ipsa loquitur. However, where there is no evidence, as in the instant case, that the failure of the light bulb to light was an unusual or extraordinary occurrence, but in fact the testimony shows that such failure was a commonplace circumstance, the doctrine of res ipsa loquitur does not apply, as the facts of such occurrence do not warrant the inference of negligence. See *Herdman v. The Pennsylvania Railroad Co.*, 352 U. S. 518, 77 S. Ct. 455, 1 L. Ed. 508 (1957), where the court noted that there was no evidence to show that unscheduled and sudden stops of trains are unusual or extraordinary occurrences entitling plaintiff to a jury determination of his case under the doctrine of res ipsa loquitur.

This Court therein agreed with the lower court that a jury question of negligence was not presented by the

proofs which did not meet the tests laid down by the Supreme Court in *Jesionowski v. Boston and Maine R. Co.*, 329 U. S. 452, 91 L. Ed. 416, in determining the applicability of res ipsa loquitur.

In *Jesionowski v. Boston and Maine R. Co.*, 329 U. S. 452, 67 S. Ct. 401, 91 L. Ed. 416 (1947), this Court in finding the doctrine of res ipsa loquitur applicable there stated:

> "Derailments are extraordinary, not usual, happenings. When they do occur, a jury may fairly find that they occurred as a result of negligence. * * * With the deceased [plaintiff] freed from any negligent conduct in connection with the switch or the signalling, we have left an accident ordinarily the result of negligence, which may be attributed only to the lack of care of the railroad, the only other agency involved."

Following the *Herdman* case, the Supreme Court of Arkansas in *Purnell v. Missouri Pacific Railway Co.*, 362 S. W. (2d) 674 (1962), held that the res ipsa loquitur doctrine was not applicable to a Federal Employers' Liability Act case in the absence of extraordinary or unusual circumstances. Additionally, the court therein held that there was no conflict between defendant's instructions stating that *no* presumption arose from mere happening of accident to railroad employee and the jury could not guess, surmise of speculate on issues of negligence, proximate cause or damages and that the burden was on plaintiff to establish negligence and proximate cause, and the plaintiff's instructions imposing liability on railroad if injury resulted in whole or in part from its negligence.

In the case of *Fassbinder v. The Pennsylvania Railroad Co.*, 322 F. 2d 859 (Third Cir., 1963), relied upon so heavily by the plaintiff herein in its argument that it was

entitled to go to the jury under the doctrine of res ipsa loquitur, it must be noted that the court found that a res ipsa loquitur situation existed therein was established by the undisputed evidence, "* * * that the accident was such as in the ordinary course of things would *not* have happened if the defendant had used proper care with respect to the 'dog.'" (Emphasis added.)

In that case in which plaintiff was injured in the course of his employment when he tried to close a railroad door which stuck because of a defective mechanism used to retain tension on the hand brake of the coach which is called a 'dog," the court repeats throughout its opinion that the unusual accident was such as in the ordinary course of things would not have occurred if the defendant had used proper care.

The court in the *Fassbinder* case in determining the applicability of the doctrine quoted with favor statements from *San Juan Light & Transit Co. v. Requena*, 224 U. S. 89, 32 S. Ct. 399, 56 L. Ed. 680 (1912), and from *Forsman v. Pennsylvania Railroad Co.*, 280 F. 2d 315 (3 Cir. 1960), setting forth the essential elements of proof necessary to apply the doctrine, among which is that the cause of the accident must be without fault of the injured person, which is in addition to the essential elements of exclusive control and an unusual accident which would not have ordinarily occurred in the absence of negligence.

In the instant case it is clear that the failure of the light bulb to light was not an unusual or extraordinary happening, and that it is not ordinarily the result of negligence or of a character that in the ordinary course of events would not have happened if those having control of it used due care. In fact the failure of the light bulb to light, as in the instant case, is a common occurrence which ordinarily results without negligence, and which

will likely happen even though due care is exercised and defendant is blameless. In short, the instant case does not present a situation which makes the res ipsa loquitur doctrine applicable.

The doctrine of res ipsa loquitur should not be employed for the purpose of creating an inference of negligence when circumstances do not warrant such inference. *Victorias Milling Company v. Panama Canal Company*, 272 F. 2d 716 (Fifth Cir., 1959).

Only in the limited number of cases where the evidence meets the tests laid out in *Jesionowski v. Boston and Maine R. Co.*, 329 U. S. 452, 91 L. Ed. 416, can the doctrine of res ipsa loquitur be properly applied. "The mere occurrence of an accident of the kind and character described by the plaintiff is not one which, as the plaintiff contends, brings it within the doctrine of res ipsa loquitur. Proof of its happening was not proof that it was due to the defendant's negligence." *Labonte v. New York, New Haven and Hartford R. Co.*, 131 N. E. 2d 203 (Cert. denied, 351 U. S. 974, 76 S. Ct. 1033, 100 L. Ed. 1492). See *Sweeney v. Erving*, 228 U. S. 233, 57 L. Ed. 815.

Common experience tells us that light bulbs ordinarily fail to light in the absence of negligence which is contrary to the postulate necessary to apply the doctrine of res ipsa loquitur, i.e., that physical causes of the kind which produce the accident in question do not ordinarily exist in the absence of negligence. *Victorias Milling Co. v. Panama Canal Company*, 272 F. 2d 716.

The following statement of the court in *Andros Shipping Co. v. Panama Canal Company*, 298 F. 2d 720 (Fifth Cir., 1962), concisely sets forth the doctrine and the reason it is not applicable in the instant case:

> "Res ipsa loquitur is a rule of evidence that allows an inference of negligence to be drawn when the cir-

> cumstances indicate that an accident would not have occurred unless the defendant was negligent. Three conditions are necessary for the principles of res ipsa loquitur to apply: '(1) the accident must be of a kind which ordinarily does not occur in the absence of someone's negligence; (2) it must be caused by an agency or instrumentality within the exclusive control of the defendant; (3) it must not have been due to any voluntary action or contribution on the part of the plaintiff.' Prosser on Torts § 42 (2d ed. 1955). The doctrine rests on a process of elimination. When one or more of those conditions does not exist, the rationale underlying the rule (the exclusion of all reasonable explanations for the accident other than the defendant's negligence) is punctured."

There can be no question that the plaintiff's accident in this case was of a kind which does in fact occur without someone's negligence and that, *additionally*, the voluntary action of the plaintiff herein contributed to his accident, so that the necessary factual foundations are lacking in the instant case to apply the rule. The facts are such that dictate that the doctrine should not be applied in the instant case. See *Andros Shipping Co. v. Panama Canal Company*, 298 F. 2d 720 (1962).

In *San Juan Light & Transit Co. v. Requena*, 224 U. S. 89, 32 S. Ct. 399, 56 L. Ed. 680 (1912), this Court in applying the doctrine of res ipsa loquitur recognized that the "doctrine is of restricted scope and when misapplied is calculated to operate prejudicially * * *," but in that case found that the "deceased was without fault." This Court therein defined "the doctrine of *res ipsa loquitur*, which is, when a thing which causes injury, *without fault of the injured person*, is shown to be under the exclusive control of the defendant, *and the injury is such as, in the ordi-*

nary course of things, does not occur if the one having such control uses proper care, it affords reasonable evidence, in the absence of an explanation, that the injury arose from the defendant's want of care." (Emphasis added.)

In *Forsman v. Pennsylvania Railroad Co.*, 280 F. 2d 315 (3 Cir. 1960), the court in finding that there was a true res ipsa loquitur jury question presented as to the defendant railroad stated that, "The proofs indicated that the *unusual* accident involved would not have ordinarily occurred in the absence of negligence, that it took place on the premises exclusively controlled by defendant and that *plaintiff was blameless. Weigand v. Pennsylvania Rail-Road Co.*, (3 Cir. 1959), 267 F. 2d 281; *Giannove v. U. S. Steel Corp.*, (3 Cir. 1956), 238 F. 2d 544." (Emphasis added.)

There cannot be any question that the applicability of the doctrine of res ipsa loquitur cannot depend on the mere fact alone that an accident happened. On the contrary, it must appear that the accident was of an unusual character—the kind that would not ordinarily h ppen unless someone was guilty of negligence. See additional citations in 35 *A. L. R.* 2d at page 508.

Finally, with regard to the division of control element in determining the applicability of the doctrine in a Federal Employers' Liability Act case, it has been established that res ipsa loquitur is *not* applicable where the plaintiff's control over or connection with the instrumentality which caused his injury was a causative factor in bringing about the injury, as is true in the instant case. *Jesionowski v. Boston and Maine R. Co.*, 329 U. S. 452, 91 L. Ed. 416 (1947); *Forsman v. Pennsylvania Railroad Co.*, 280 F. 2d 315 (3 Cir. 1960).

Clearly, the proofs in the present case do not show that the accident was of such a character as to justify the inference of negligence on the part of the defendant railroad.

3. When the evidence in an action against a railroad company under the Federal Employers' Liability Act is such that without weighing the credibility of witnesses there can be but one reasonable conclusion as to the verdict, the court should determine the proceeding by directed verdict or otherwise in accordance with the applicable state practice without submission to the jury.

Counsel for Petitioner admitted in both oral argument and in his brief in the Supreme Court of Ohio that "the technical requirements of res ipsa loquitur may not be presented."

As is clearly shown hereinabove, the trial court in directing a verdict for defendant herein, merely followed the well established authorities on the requirement of notice set forth hereinabove, citing cases from the Second, Third, Fourth, Sixth, Seventh and Eighth Federal Judicial Circuits, to which defendant in its brief herein has added cases from the First, Fifth and Ninth Circuits, all of which support the trial court's ruling.

With regard to the applicability of the doctrine of res ipsa loquitur, it is apparent that both the trial court and the Court of Appeals in affirming the judgment of the trial court herein, followed this Court in finding that the proofs of fact in the instant case did not warrant the application of the doctrine according to the tests laid down by the Supreme Court in *Jesionowski v. Boston and Maine R. Co.*, 329 U. S. 452, 91 L. Ed. 416, as was fully discussed hereinabove.

It is significant to note that plaintiff admits both in his oral argument and in his brief filed in the Supreme Court of Ohio that "the technical requirements of res ipsa loquitur may not be present," although he would, nevertheless, like this Court to apply the doctrine and hold that the trial court and the Court of Appeals erred in not doing so when following the well established applicable law on the subject.

Petitioner's last ditch attempt to save the day by arguing that he was denied his constitutional guarantee of a trial by jury because the trial court directed a verdict for defendant at the close of plaintiff's case is readily disposed of by the decision of this Court in *Brady v. The Southern Railway Co.*, 320 U. S. 476, 88 L. Ed. 239 (1943), in which the second and third paragraphs of the headnotes read as follows:

> 2. "More than a scintilla of evidence is required in an action against a railroad company under the Federal Employers' Liability Act before the case may properly be left to the discretion of the trier of fact.
>
> 3. "When the evidence in an action against a railroad company under the Federal Employers' Liability Act is such that without weighing the credibility of the witnesses there can be but one reasonable conclusion as to the verdict, the court should determine the proceeding by nonsuit, directed verdict or otherwise in accordance with the applicable practice without submission to the jury, or by judgment notwithstanding the verdict."

The *Brady* case and numerous other cases cited in defendant's brief hereinabove conclusively establish that there still must be a judicial appraisal as to the sufficiency of evidence to support a jury verdict in a FELA case, which must be more than a scintilla, and that when the

evidence is such that without weighing the credibility of witnesses there can be but one reasonable conclusion as to the verdict, the court should determine the proceedings by directed verdict or otherwise in accordance with applicable practice without submission to the jury. In doing so, it does not violate plaintiff's constitutional right to a trial by jury under the Federal Employers' Liability Act. See *Moore v. Chesapeake and Ohio Railway Co.*, 340 U. S. 573, 95 L. Ed. 547 (1951), where this Court in rejecting precisely the same argument made by plaintiff herein (that to deprive the plaintiff of the benefits of the verdict of the jury was to deny her a right guaranteed under the Seventh Amendment to the Constitution), stated that it was incumbent upon petitioner to prove negligence of respondent which caused the accident, holding that speculation cannot supply the place of proof, and that since there was no evidence of negligence, the court properly sustained the motion for judgment notwithstanding the verdict, as is pertinent to the instant case.

CONCLUSION.

The Court of Appeals properly affirmed the judgment of the trial court which granted defendant's motion for a directed verdict at the close of plaintiff's case as there was *no* evidence that the defendant railroad had any actual or constructive notice of the alleged defective condition (light bulb), claimed to be the sole cause of plaintiff's accident, which must be shown to establish negligence on the part of the railroad under the Federal Employers' Liability Act. Liability of the employer under the safe place to work concept of the FELA is not absolute but is grounded upon negligence, so that in the absence of the required proof that such defect was known or should have been known by defendant with opportunity to correct it, plaintiff failed to establish his case requiring the trial court to determine the proceeding by directed verdict. Negligence on the part of the railroad herein cannot be inferred from the mere happening of the incident nor may the employee recover solely by proving injury from a defective appliance without proof of negligence, as this is not an action under the Federal Safety Appliance Act.

The Court of Appeals properly affirmed the judgment of the trial court which refused to submit the case to the jury on the doctrine of res ipsa loquitur as there was no evidence to show that the failure of the light bulb herein was an unusual or extraordinary occurrence or that the accident was such as in the ordinary course of things would not have happened if defendant had used proper care. The doctrine of res ipsa loquitur should not be employed for the purpose of creating an inference of negligence when circumstances do not warrant such inference, as in the instant case involving a commonplace occurrence of a burned out light bulb. The occurrence of an accident

of the kind and character shown by the proofs herein is not one which brings it within the doctrine of res ipsa loquitur, so that proof of its happening might properly infer that it was due to defendant's negligence.

Additionally, the doctrine of res ipsa loquitur is not applicable herein, as plaintiff's own negligent action was a causative factor in bringing about his injury.

The state courts of Ohio in reaching their decisions herein properly followed the applicable decisions of this Court and of the United States Courts of Appeals in point with the issues involved. Accordingly, respondent respectfully submits that it would be improvident to grant a writ of certiorari in the case at bar.

Respectfully submitted,

JOHN F. DOLAN,
F. M. APICELLA,
Attorneys for Respondent.

APPENDIX "A."

Memorandum to Counsel.

No. 720,229.

IN THE COURT OF COMMON PLEAS,

CUYAHOGA COUNTY, OHIO.

HENRY THOMAS BAILEY,

Plaintiff,

vs.

THE NEW YORK CENTRAL RAILROAD COMPANY,

Defendant.

CHARLES W. WHITE, *J.*:

This is an action by favor of the Federal Employers' Liability Act.

At the close of plaintiff's case defendant moves for a directed verdict on the express ground that there is no evidence that defendant had either actual or constructive notice of any defect on the premises in question.

On April 2, 1956, and before, plaintiff was an employee of the defendant as a janitor-porter at a dormitory operated and maintained by the defendant in Cleveland for incoming and outgoing dining car crews. On that date defendant fell in the dark on a stairway in the dormitory while attempting to go to the basement room and cut off the flow of gas to an overheated furnace. He charged the defendant was negligent in:

1. Failing to provide a lighted stairway for his use;

2. Failing to warn of the absence of lighting on the stairway;

3. Failing to seasonably inspect, discover and repair the darkened condition of the stairway;

4. Failing to provide a properly functioning furnace;

5. Failing to exercise reasonable care to provide plaintiff with a safe place in which to work; and

6. Failing to seasonably inspect and maintain the gas furnace.

All of these specifications can, in the view of the Court, be summarized as a charge that defendant failed to provide the plaintiff with a safe place in which to work.

The evidence adduced on behalf of the plaintiff, when given its most favorable intendment, tends to establish the following set of facts: Plaintiff had been an employee of the defendant for thirty (30) years in a variety of capacities. In 1950 he became the janitor-porter at the dormitory in Cleveland having applied for the job following a slight stroke in 1948. His duties generally were to check the crews in and out of the dormitory and to maintain a state of orderliness and cleanliness therein and to make beds. He had no duty with respect to lighting figures or work in that connection, including the changing of light bulbs. The defendant employed electricians for all such work under the supervision of the Superintendent of Buildings and Docks. The dormitory and its appurtenances were customarily inspected once each week and usually on a Monday. Plaintiff's hours of duty were from 4:00 P. M. to midnight.

On the day in question (being a Monday), plaintiff reported for duty at the usual hour. About 6:30 P. M. he received a complaint of excessive heat in the dormitory. He opened the doors and windows and turned the thermostat down. Other complaints followed so that at about 8:30 P. M. he called the Stationmaster's office and was

informed that the office would try to do something about it but that in the meantime he should call the East Ohio Gas Company. This he did and the company promised to send a workman to the dormitory.

Plaintiff's instructions were that when anything untoward should happen in the dormitory he was to call Mr. Ryan, the Superintendent of Dining Car Service and his immediate superior; and that if Mr. Ryan could not be reached he was to call the Stationmaster's office. At that hour of the evening plaintiff did not have Mr. Ryan's residence telephone.

When time passed and the condition of overheating persisted, plaintiff again called the Gas Company about 9:30 P. M. On that occasion he was instructed to turn the thermostat down and to go to the basement and shut off the valve controlling the flow of gas. He was given directions by the Gas Company representative how to locate the valve and how to operate the same. He proceeded to the door which opens inward upon the wooden stairway with open risers leading to the basement. With his right hand he opened the door and with his left hand reached to his left and flicked the light switch. The light did not come on. In the darkness he fell at the same moment.

Plaintiff had been down that stairway on other occasions. About a month prior to his accident he had occasion to go down there to look at a condition of flooding. On every other occasion except the one on April 2, 1956, the light came on when he flicked the switch. He had never had occasion to use a flashlight. The defendant furnished no flashlight for his use. No inspection of the premises had been made during his tour of duty that night.

In support of its motion defendant cites a number of Federal Employers' Liability Act decisions, most of them being by United States Courts of Appeals.

In the case of *Fassbinder v. Pennsylvania Railroad Co.*, 193 F. Supp. 767 (1961), on motion by the railroad for a new trial, the District Court held that in the absence of proof of actual or constructive notice to the railroad of the defect in a coach, the employee, allegedly injured as a result of the defect, failed to establish his case under the Federal Employers' Liability Act. The Court pointed out that the action under the Federal Employers' Liability Act is one grounded upon negligence, that the basis of liability thereunder is, and still remains, negligence, and that subject to the qualifications which Congress has imported into this Act, the term "negligence" as it appears in the Act "is founded on common law concepts of negligence and injury."

The Court added:

> "The common law concept of negligence and injury with respect to the duty of an employer to provide a safe place to work requires an employer to have actual or constructive notice of a defective condition before he can be charged with a violation of his duty," citing *Sano v. Pennsylvania R. R. Co.*, 282 F. 2d 936 (3 Cir., 1960); and *Dobson v. Grand Trunk Western R. R. Co.*, 238 F. 2d 545 (7 Cir., 1957).

The Court concluded that there being no proof of either actual or constructive notice plaintiff had failed to establish his case and a new trial was ordered.

Another of the cases cited by defendant in support of its motion is *Kaminski v. Chicago River & Indiana R. Co.*, 200 F. Rep. 2d 1 (7 Cir., 1952). In that case a conductor carrying a light fell through a hole in a customer's empty coal pit while walking along the track checking car numbers. The railroad had no actual or constructive knowledge of the condition which obtained upon its customer's

premises. *Held*: Error for refusal to direct a verdict for defendant at the close of plaintiff's case.

The Court said, among other things:

"The mere fact * * * that plaintiff sustained an injury does not render defendant liable. * * * Since the test of liability in this case is negligence, the burden of proving defendant's negligence was on the plaintiff. In other words, he must establish that some negligence of the defendant caused, in whole or in part, the injury of which he complains.

"Here the evidence is that plaintiff himself had walked safely on this identical path or lane on many previous nights. He had looked at the lane and the path he was traveling on the night in question and had noticed nothing unusual or unsafe. On that night he carried a light. He was watching where he was going and he could see where he was going. He testified that he saw nothing unusual or unsafe. He suddenly fell through the hole which he had never seen before. There was no evidence whatsoever in the record as to how long the hole had been in existence there. It could not have been in existence very long because plaintiff himself had walked safely and without observing any hole or any unsafe condition over the same path on previous nights. There is nothing in the record to indicate that the condition which caused plaintiff's fall had existed for more than a short time before the accident.

"Before defendant can be charged with negligence in failing to remedy the condition which caused plaintiff's injury, or failed to warn plaintiff of the existence of such a condition, it is necessary to establish that the defendant had actual knowledge of the condition, or, in the exercise of ordinary care, should have known of its existence. The record in this case clearly establishes that such circumstances did not exist here. The only inference that can reasonably be

drawn from this record is that the condition which caused the accident had been created within a short time before plaintiff's injury. It may have been a matter of minutes or of hours, hence defendant cannot on this record be charged with constructive knowledge of the condition."

In *Atlantic Coast Line Railroad v. Collins*, 235 F. 2d 805 (4 Cir., 1956) (Cert. denied), wherein plaintiff injured his back while throwing a switch in the railroad yards, the trial court refused a directed verdict for the defendant and it was held to be error. The sole question was whether there was sufficient evidence of negligence on the part of the railroad company to take the case from the jury. Plaintiff was a young man who had been in the service of the company for several years, most of which time was spent as a switchman in the same yard. He reported for duty at 4:00 P. M. and the accident occurred at 7:00 P. M. The switching device was of a standard type, the operation of which was familiar to the plaintiff who had previously operated the same switch a dozen times between 4 and 7 o'clock without difficulty. Plaintiff's whole case was based upon his testimony that on the occasion of the injury "the switch was hard to operate."

The Court said, among other things:

"(The) testimony taken in the light most favorable to the plaintiff may give rise to the speculation whether the injury was due to a defective switch of the railroad company or to the defective back of the man; but speculation is not enough. 'The essential requirement is that mere speculation be not allowed to do duty for probative facts, after making due allowance for all reasonably possible inference favoring the party whose case is attacked'," citing *Tennant v. Peoria & P. U. Ry. Co.*, 321 U. S. 29.

In *Schilling v. Delaware & H. R. Corporation*, 114 F. 2d 69 (2 Cir., 1940), paragraph 3 of the headnotes reads as follows:

> "In order to render railroad liable for injury to brakeman who was run over when he caught his foot in space in tie which was composed of discarded rails welded together, the brakeman was required to prove either actual notice to railroad of defective condition of tie resulting from fact that cinder filling in tie had washed out, or that the cinders had been washed out for sufficient length of time to charge railroad with constructive notice and duty to repair."

The Court said, among other things:

> "As his day began at 4 o'clock that afternoon there was little on which the jury could have found that the hole had been there long enough to charge the defendant with constructive notice and the duty to repair. Proof of actual notice was wholly lacking. One or the other must appear to make out actionable negligence for failure to repair."

A case of much interest is that of *Phillips v. Great Northern Railway Co.*, 100 N. W. 2d 765 (Minnesota Supreme Court 1960) on an issue whether the railroad failed to furnish a safe place to work because a light bulb had burned out. It was held to be reversible error to refuse a requested instruction as follows:

> "You are instructed that while defendant was under a continuing obligation to exercise ordinary care in providing plaintiff with a reasonably safe place to work, the mere fact that a light bulb was burned out at the time of the accident is not evidence of negligence on its part. Before you may find that defendant was at fault in this regard you must determine whether the evidence shows that defendant had a reasonable opportunity to replace the bulb and failed to do so."

The plaintiff in that case was a freight car repairman. He and other members of his crew went to lunch about 7:30 P. M. When they returned to work the foreman turned on the lights. The lights were located on poles about thirty feet from the ground. The bulb on the pole nearest the car where plaintiff was working was out. It was burning the night before. No one in the crew had authority to replace the burned-out bulb, nor was there any facility to reach it. That work could only be done by electricians. The foreman made a report that the light was out, the only thing he could do. The accident happened not more than fifty-five minutes after it was discovered that the light was out.

The Court said:

> "In our opinion, whether defendant had a reasonable opportunity to replace the burnt-out bulb was properly a matter for the consideration of the jury in its determination of whether defendant was negligent in failing to furnish a safe place to work because of lack of sufficient light. We think that the court erred in refusing to give the requested instruction, or to include in its charge the substance of it if the language used was subject to criticism."

The most recent case having some bearing upon the instant subject is that of *Miller v. Cincinnati, New Orleans & Texas Pacific Ry. Co.*, 317 F. 2d 693 (6 Cir., May 22, 1963) where the first headnote states as follows:

> "A railroad could not be held for negligence under the Federal Employers' Liability Act for a defective fire hose nozzle in absence of proof that the defect was known, or should have been known, by railroad with opportunity to correct it."

In the course of the opinion, it is said:

> "Defendant, however, properly argues that negligence cannot be predicated solely on the fact that the

appliance was defective. (The action was not under the Safety Appliance Acts). Under familiar law, defendant could not be convicted of negligence, absent of proof that such defect was known, or should or could have been known, by defendant, with opportunity to correct it."

The plaintiff here cites two cases as having an import contrary to that of the foregoing authorities. In *Beattie v. Elgin, Joliet and Eastern Ry. Co.*, 217 F. 2d 863 (7 Cir., 1955), a switchman complained of personal injuries sustained in a fall at his place of work. It was held that the question of whether presence of oil and grease at the place of work created an unsafe place to work and caused plaintiff's fall and injuries and the question of defendant's knowledge, actual or constructive, of allegedly unsafe condition were for the jury. Under the circumstances of that case where there was some evidence that the unsafe condition had existed frequently and recurrently for some time and where the presence of grease and oil upon the sole and heel of a man's shoe was inevitable.

In *Chicago Great Western Railway Co. v. Casura, et al.*, 234 F. 2d 441 (8 Cir., 1956), a switch foreman employed by the railroad was injured when a car moving on a spur track on a packer's premises came in contact with wooden gate while walking along the track. There was no evidence of notice but there was evidence that the condition causing the injury could have been discovered by timely inspection.

In passing, it may be noted that the Court has also examined the very recent case of *Gallick v. Baltimore & Ohio Railroad Co.*, 31 L. W. 4182 (2/19/63); 35 *Am. Jur.* 557, *et seq.*; 36 *Ohio Jur.* 2d 117, *et seq.*; and 2 *Cal. Jury Instructions* 1038 (No. 3034).

The foregoing authorities clearly point the way for the Court's decision in the instant case. Although it seems

to have been assumed throughout the trial thus far that the electric light in question burned out, there is no evidence as to what the source of the defective condition actually was. While the ill-functioning gas furnace afforded the occasion for the plaintiff's attempt to go into the basement, it was not in and of itself a causal factor in the plaintiff's fall. If an inspection was made of the premises during the day on Monday, April 2, 1956, it is common knowledge that the light bulb could have burned out at any time between the conclusion of the inspection and 10:30 P. M. that same day.

The situation, therefore, is akin to that in the case of *Brady v. Southern Ry. Co.*, 320 U. S. 476, where the Court stated as follows:

> "The weight of the evidence under the Employers' Liability Act must be more than a scintilla before the case may be properly left to the discretion of the trier of fact—in this case, the jury. * * * When the evidence is such that without weighing the credibility of the witnesses there can be but one reasonable conclusion as to the verdict, the court should determine the proceeding by non-suit, directed verdict or otherwise in accordance with the applicable practice without submission to the jury, or by judgment notwithstanding the verdict. By such direction of the trial the result is saved from the mischance of speculation over legally unfounded claims."

Accordingly, the motion for a directed verdict in favor of the defendant must be granted.

Plaintiff excepts. O. S. J.

APPENDIX "B."

Journal Entry of the Court of Appeals.

No. 26,738.

COURT OF APPEALS OF OHIO,

EIGHTH DISTRICT, COUNTY OF CUYAHOGA.

HENRY THOMAS BAILEY,

Plaintiff-Appellant,

vs.

THE NEW YORK CENTRAL RAILROAD COMPANY,

Defendant-Appellee.

JOURNAL ENTRY.

Date: April 15, 1964:

This cause came on to be heard on the appeal on question of law from the judgment of the Common Pleas Court of Cuyahoga County and was argued by counsel for the parties; and upon consideration, the Court finds no error prejudicial to the appellant, and therefore, the judgment of the Common Pleas Court is affirmed, and it is ordered that appellee recover of appellant his costs herein taxed.

The Court finds there was reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Common Pleas Court to carry this judgment into execution.

APPENDIX "C."

Opinion of Supreme Court of Ohio.

No. 38816.

IN THE SUPREME COURT OF OHIO.

HENRY THOMAS BAILEY,

Plaintiff-Appellant,

vs.

THE NEW YORK CENTRAL RAILROAD CO.,

Defendant-Appellee.

Decided July 1, 1964:

APPEAL from the Court of Appeals for Cuyahoga County.

The appeal as of right herein is dismissed for the reason that no substantial constitutional question is involved.

TAFT, C. J., ZIMMERMAN, MATTHIAS, O'NEILL, GRIFFITH and GIBSON, JJ., concur.